S. Hrg. 101-456

COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 198

A BILL TO AMEND TITLE 17, UNITED STATES CODE, THE COPYRIGHT ACT TO PROTECT CERTAIN COMPUTER PROGRAMS

APRIL 19, 1989

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COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1989

WEDNESDAY, APRIL 19, 1989

U.S. SENATE,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:15 p.m., in room 226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Also present: Senators Adams, Grassley, and Hatch.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The Subcommittee on Patents, Copyrights and Trademarks will come to order.

Our subject matter today is S. 198, the Computer Software Rental Amendment Act of 1989 introduced by the ranking minority, my good friend, Senator Orrin Hatch.

I believe that it is appropriate that we begin the 101st Congress with a hearing on how best to protect computer software. In the past, the United States has proven itself to be the world leader in development of new technologies; unfortunately, we have not proven to be as adept at protecting the technologies we have developed.

At present, our computer software industry is without equal anywhere in the world. We must promptly begin to examine ways to maintain this preeminence.

Today's hearings on prohibiting rental of computer software is a first step in that examination. I congratulate Senator Hatch for taking this initiative, and I am glad to be a cosponsor of this bill.

[The prepared statement of Senator DeConcini and a printed copy of S. 198 follow:]

STATEMENT OF DENNIS DeCONCINI

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

S. 198, COMPUTER SOFTWARE RENTAL AMENDMENTS ACT

APRIL 19, 1989

I AM PLEASED TO CONVENE THE FIRST HEARING OF THE 101st CONGRESS OF THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS. OUR SUBJECT MATTER TODAY IS S. 198, THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1989, INTRODUCED BY THE RANKING MINORITY MEMBER OF THE SUBCOMMITTEE, SENATOR HATCH.

I BELIEVE THAT IT IS APPROPRIATE THAT WE BEGIN THE 101st CONGRESS WITH A HEARING ON HOW BEST TO PROTECT COMPUTER SOFTWARE. IN THE PAST THE UNITED STATES HAS PROVEN ITSELF TO BE THE WORLD'S LEADER IN DEVELOPING NEW TECHNOLOGIES. UNFORTUNATELY, WE HAVE NOT PROVEN TO BE AS ADEPT IN PROTECTING THE TECHNOLOGIES WE HAVE DEVELOPED. AT PRESENT, OUR COMPUTER SOFTWARE INDUSTRY IS WITHOUT EQUAL ANYWHERE IN THE WORLD. WE MUST PROMPTLY BEGIN TO EXAMINE WAYS TO MAINTAIN THAT PREEMINENCE. TODAY'S HEARING ON PROHIBITING RENTAL OF COMPUTER SOFTWARE IS A FIRST STEP IN THAT EXAMINATION. I CONGRATULATE SENATOR HATCH FOR TAKING THE INITIATIVE IN INTRODUCING S. 198.

WE HAVE INVITED A DISTINGUISHED AND EXPERT GROUP OF WITNESSES TODAY TO HELP US CONSIDER THIS LEGISLATION. I LOOK FORWARD BOTH TO THEIR TESTIMONY AND TO THEIR ASSISTANCE IN PERFECTING S. 198 IN ORDER TO PROVIDE THE APPROPRIATE LEVEL OF PROTECTION FOR COMPUTER SOFTWARE WHILE MAINTAINING REASONABLE ACCESS TO THE PUBLIC.

II

101st CONGRESS
1st Session

S. 198

To amend title 17, United States Code, the Copyright Act to protect certain computer programs.

IN THE SENATE OF THE UNITED STATES

January 25 (legislative day, January 3), 1989

Mr. Hatch introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 17, United States Code, the Copyright Act to protect certain computer programs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Computer Software Rental Amendments Act of 1989".

Sec. 2. Section 109(b) of title 17, United States Code, is amended by—

(1) amending paragraph (1) to read as follows:

"(b)(1) Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of a sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution."; and

(2) amending paragraph (3) to read as follows:

"(3) Any person who distributes a phonorecord or a copy of a computer program (including any tape, disk, or other medium embodying such program) in violation of clause (1) is an infringer of copyright under section 501 of this title and is subject to the remedies set forth in sections 502, 503, 504, 505, and 509. Such violation shall not be a criminal offense under section 506 or cause such person to be subject to the criminal penalties set forth in section 2319 of title 18.".

Senator **DeConcini**. We have invited a distinguished and expert group of witnesses today, and I look forward to listening to them.

After the ranking member is finished, we are going to let our colleague from Washington introduce one of those witnesses.

Senator Hatch?

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator **Hatch**. Thank you, Senator DeConcini. I would like to thank you for scheduling this hearing.

Last year, when I first introduced the Computer Software Rental Amendments Act, you allowed me to hold a field hearing in Provo, UT, where we received important testimony regarding the need for this legislation. Because of that strong support, I reintroduced this measure this year, and I want to thank you for your consideration in helping to expedite the bill's consideration this year.

The computer software industry is a dynamic and blossoming source of growth for our Nation's economy. It is one of the dynamic elements of American industry because it is an area in which we are still a world leader.

Last fall, during our hearing on this legislation, we heard some troubling testimony. The computer software industry, a current source of our pride, now finds itself in a perilous situation. Around the country, a practice has begun to develop in which businesses are opening for the purpose of renting computer software. Given the nature of computers and software, the overwhelming rationale for renting a computer program is to make an unauthorized copy.

Computer software is often not something that can be enjoyed for an evening's entertainment and then returned. To have meaning to a user, software packages require mastery of complex user manuals, often running hundreds of pages in length. Even after a user has mastered the use of a program, it has little value until he or she adds his or her own data base to that program.

The functions of learning how to use a program and utilizing it in connection with one's own data base usually cannot be accomplished in the few hours or days available under a rental arrangement without copying the program and displacing a legitimate sale of the program.

The purpose of S. 198, the Computer Software Amendments Act, is to amend the copyright law to address the problem of unauthorized computer software duplication. The bill I have introduced would provide software protection by requiring the authorization of the copyright owner before a particular copy of a computer program could be rented or leased for the purposes of direct or indirect commercial advantage.

Since I first introduced this bill, some concerns have been expressed. As drafted, the bill does not provide the exemption for libraries that is found in the Record Rental Amendments Act, which both Senator DeConcini and I worked on. While I do believe that the differences between software and records make software a much likelier candidate for illegal duplication, I am not insensitive to the libraries' needs.

I have encouraged the software publishers to meet with the libraries and attempt to work out an agreeable solution, which I understand they have done. With this agreement, I understand that they will propose that the bill include an exemption for nonprofit libraries. Under the agreement, libraries will be required to affix to each software package a notice stating that it is illegal to copy software without permission.

Finally, the agreement would provide for a study by the Register of Copyrights 3 years after the effective date of this bill to determine the effectiveness of the bill and the library exemption.

Concerns were also raised regarding the current practice of many video rental stores in renting computer game cartridges. Frankly, when I introduced this legislation, rental of these cartridges, which for all intents and purposes are copy-proof, was not a concern.

I understand the Software Publishers have also agreed to propose an amendment which would exempt the rental of these cartridges. We will take up these amendments at the subcommittee markup.

Mr. Chairman, the threat of unlimited computer software rental poses just as grave a concern to the computer software industry today as did the threat of unlimited record rental to the recording industry in 1984.

I look forward to the testimony we will receive today from our witnesses during this hearing, and I welcome all the witnesses to the hearing.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch follows:]

STATEMENT OF SEN. ORRIN HATCH

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT

Mr. Chairman, I would like to thank you for scheduling this hearing. Last year, when I first introduced the Computer Software Rental Amendments Act, you allowed me to hold a field hearing in Provo, Utah, where we received important testimony regarding the need for this legislation. Because of that strong support, I reintroduced this measure this year, and I want to thank you for your consideration and help in expediting the bill's consideration this year.

The computer software industry is a dynamic and blossoming source of growth for our nation's economy. It is one of the dynamic elements of American industry because it is an area in which we are still a world leader.

Last fall, during our hearing on this legislation, we heard some troubling testimony. The computer software industry, a current source of pride, now finds itself in a perilous situation. Around the country, a practice has begun to develop in which businesses are opening for the purpose of renting computer software. Given the nature of computers and software, the overwhelming rationale for renting a computer program is to make an unauthorized copy.

Computer software is often not something that can be enjoyed for an evening's entertainment and then returned. To have meaning to a user, software packages require mastery of complex user manuals, often running hundreds of pages in length. Even after a user has mastered the use of a program, it has little value until he or she adds his or her own data base to the program. The functions of learning how to use a program and utilizing it in connection with one's own data base usually cannot be accomplished in the few hours or days available under a rental arrangement without copying the program and displacing a legitimate sale of the program.

The witnesses at our previous hearings stated that the industry estimates that there is probably an illegal copy of a computer program for each copy legitimately sold. I find this appalling. If we allow computer programs to continue to be rented for a few dollars a day and then copied, thereby depriving computer software companies of their ability to recover the investment of developing their new products, we may soon see this promising industry disappear from our marketplace.

The purpose of S. 198, the Computer Software Rental Amendments Act is to amend the copyright law to address the problem of unauthorized computer software duplication. The bill I have introduced would provide software protection by requiring the authorization of the copyright owner before a particular copy of a computer program could be rented or leased for the purposes of direct or indirect commercial advantage.

Since I first introduced this bill, some concerns have been expressed. As drafted, the bill does not provide the exemption for libraries that is found in the Record Rental Amendments Act. While I do believe that the differences between software and records make software a likelier candidate for illegal duplication, I am not insensitive to the libraries' needs. I have encouraged the software publishers to meet with the libraries and attempt to work out an agreeable solution, which they have done. Under their agreement, the bill will include an exemption for nonprofit libraries. Libraries will be required to affix to each software package a notice stating that it is illegal to copy software without permission. Finally, the agreement would provide for a study by the Register of Copyrights three years after the effective date of the bill to determine the effectiveness of the bill and the library exemption.

Concerns were also raised regarding the current practice of many video rental stores in renting computer game cartridges. Frankly, when I introduced this legislation, rental of these cartridges, which for all intents and purposes are copy-proof, was not a concern. The Software Publishers have also agreed to an amendment which would exempt the rental of these cartridges.

Mr. Chairman, the threat of unlimited computer software rental poses just as grave a concern to the computer software industry today as did the threat of unlimited record rental to the recording industry in 1984. I look forward to the testimony we will receive from our witnesses during this hearing.

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Senator DECONCINI. Thank you, Senator Hatch.

Senator Grassley has a statement that will appear in the record at this time.

[The prepared statement of Senator Grassley follows:]

STATEMENT OF SENATOR CHARLES E. GRASSLEY

MR. CHAIRMAN, THE COMPUTER SOFTWARE INDUSTRY REPRESENTS A STRONG GROWTH SEGMENT OF OUR ECONOMY. IT DEMONSTRATES THAT THE CREATIVE AND ENTREPRENURIAL SPIRIT IS ALIVE AND WELL. AND, IT IS AN AREA IN WHICH U.S. COMPANIES, LARGE AND SMALL, ARE LEADING THE WORLD IN THE DEVELOPMENT OF NEW TECHNOLOGY.

SOFTWARE IS PROTECTED BY THE COPYRIGHT ACT, BUT UNDER THE "FIRST SALE" RULE, SOMEONE WHO BUYS COMPUTER PROGRAMS CAN REDISTRIBUTE THE SOFTWARE WITHOUT THE CONSENT OF THE COPYRIGHT OWNER -- IN THIS CASE, THE SOFTWARE DEVELOPER. THE RESULT IS THAT, -- IN THE SAME WAY VIDEO CASETTE RENTAL BUSINESS HAS DEVELOPED, -- STORES RENTING COMPUTER SOFTWARE HAVE SPRUNG UP. BUT THE DIFFERENCE BETWEEN RENTING MOVIES AND COMPUTER SOFTWARE IS THAT THERE ARE GREATER INCENTIVES AND EASIER ABILITY TO COPY SOFTWARE. THUS, THE SOFTWARE DEVELOPERS, WHO INVEST GREAT SUMS OF MONEY TO CREATE THE SOFTWARE AND WHO DEPEND ON SALES TO RECOUP THEIR INVESTMENT, ARE BEING UNDERCUT.

SOFTWARE PRODUCERS CLAIM THAT THE SITUATION THEY FACE IS SIMILAR TO THAT FACED BY THE RECORDING INDUSTRY A FEW YEARS AGO. THE CONGRESS RESPONDED WITH LEGISLATION TO AMEND THE FIRST SALE RULE, AND ESSENTIALLY PROHIBITED THE RENTAL OF RECORDS. WE EXTENDED THAT RECORD RENTAL EXEMPTION LAST YEAR.

PERHAPS THE TIME HAS COME TO TAKE THE SAME ACTION IN THE SOFTWARE INDUSTRY. THAT IS PRECISELY WHY THESE HEARINGS ARE IMPORTANT -- SO THAT WE MAY HEAR FROM THOSE PRODUCING THIS TECHNOLOGY AS TO THE PROBLEMS THEY EXPERIENCING. ANY PROHIBITION ON THE RENTAL OF COMPUTER SOFTWARE MUST BALANCE THE NEEDS OF THE INDUSTRY WITH THOSE OF THE PUBLIC TO HAVE REASONABLE ACCESS. THAT'S THE WAY WE WERE ABLE TO WORK IT OUT IN THE CASE OF THE RECORD INDUSTRY -- BY ALLOWING NONPROFIT LIBRARIES AND CERTAIN EDUCATIONAL INSTITUTIONS TO CONTINUE TO BE ABLE TO LOAN OUT RECORDS.

SO, I LOOK FORWARD TO HEARING FROM THE WITNESSES TODAY, REPRESENTATIVES FROM THE SOFTWARE INDUSTRY, LIBRARIES AND OTHER INTERESTED PARTIES, INCLUDING THE COPYRIGHT OFFICE. AND, I COMMEND SENATOR HATCH FOR TAKING THE FIRST STEP IN ADDRESSING THE PROBLEM BY INTRODUCING S. 198. THANK YOU, MR. CHAIRMAN.

Senator DECONCINI. We are going to go out of order for a moment to permit our colleague, Senator Adams, to introduce Mr. Shirley from Washington, DC.

Senator?

STATEMENT OF HON. BROCK ADAMS, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator ADAMS. Thank you very much, Mr. Chairman and Senator Hatch. I deeply appreciate your courtesy in allowing me to introduce the president of Microsoft. I think when you hear my statement you will understand why it is that I have asked for this privilege of being able to interrupt your hearing for a moment so I might introduce Mr. Shirley, who will testify later.

I want to state to Senator Hatch and to the chairman that I support the Computer Software Rental Amendments Act. I am a cosponsor, and I am very much in support of it.

I want you to know my connection with Microsoft. It is not only the largest microcomputer software company in the world, which started from very small beginnings and which has its headquarters in Seattle, but the person who started Microsoft and who invented the original processes was a page of mine in the House of Representatives 20 years ago and is now a close friend of my family. It shows what an enormous amount of activity and ingenuity can be created in a very short period of time by the creativity of young people working very hard.

It is for that reason, Mr. Chairman, that I am here to introduce Mr. Jon Shirley, who is the president of the company and who will testify later.

The American software industry, as this committee knows, is now playing a very important part in our international trade balance. Microsoft, for example, receives over half of its business from overseas. But, as Senator Hatch so well stated, we have to have protection of intellectual property rights. Software piracy is an immediate threat to this industry.

Mr. Chairman and Senator Hatch, we have had to intervene once before with one of our major trading partners in order to prevent outright piracy of this computer software; because all you have is the intellectual property and the brain power of our people.

The bill that is being considered today addresses a very important aspect of intellectual property protection. Mr. Chairman, there is no reason to rent a software program other than to copy it, which is an infringement of our copyright laws.

These programs cost millions to develop, and only a few hundred dollars at the retail level. If we allow the rentals to continue, it will simply destroy this business in good time.

That is why I hope, Mr. Chairman, that you and Senator Hatch and the other members of this subcommittee will conduct a quick and favorable review of the Computer Software Rental Amendments Act.

Mr. Shirley will describe in more detail the problems associated with the rental of software, and he will testify in a later panel.

I thank you, Mr. Chairman and Senator Hatch, for giving me this opportunity. I certainly am very much in support of the bill and hope that I can help you with it as it proceeds.

Senator DeConcini. Thank you very much, Senator.

Mr. Shirley, we will get back to you shortly. We are glad to have Senator Adams here, and that is a fine introduction.

Our first witness will be Ralph Oman, Register of Copyrights. Mr. Oman is a regular witness here because of his expertise and we appreciate his being here on this legislation. Dorothy Schrader is also with us. She, too, is before this subcommittee and other committees on many, many occasions. We welcome you both.

Mr. Oman, please summarize your statement, if you would. We are going to hold all statements to 5 minutes or less. Full statements will be printed in the record as if read.

Mr. Oman?

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, WASHINGTON, DC, ACCOMPANIED BY DOROTHY SCHRADER

Mr. Oman. Thank you very much, Mr. Chairman. It is always a pleasure to return.

The bill before us today, the Computer Software Rental Amendments Act of 1989, is an important bill and the Copyright Office supports it. The bill is modeled, as you know, after the Record Rental Act of 1984 and would amend the Copyright Act to make it an act of infringement for a person to rent computer programs without gaining the OK from the copyright owner.

As we have heard from Senator Adams, computers and computer programs have become so important in recent years that we all want to make sure that current law protects the interests of creators, of software manufacturers, and of the public.

Computers have become a part of our everyday lives, and the computer industry gives us sophisticated programs that perform complicated tasks and collect and analyze information in a fraction of the time it would take by hand.

Computer software or programs are the result of many hours of intellectual labor and creativity and are the essence of what makes computers so valuable to the user.

Software rental companies have now emerged, and for a fraction of the cost of buying a computer program you can rent the program for a limited time and return it, just as you can rent the videocassettes for home viewing. But, unlike the situation with respect to videocassettes, and perhaps more closely akin to sound recordings, copying of the work by the renter is easy, inexpensive, and likely.

While the leasing or renting of computer programs is clearly a profitable exploitation of the program producer's labor, it is not, under current law, technically an infringement of the copyright on the program as long as the copyright owner authorizes the sale of copies. This principle, found in section 109 of the Copyright Act, is known as the first sale doctrine.

The Copyright Office supports legislation to grant copyright owners a right to control the commercial lending of copies of computer programs that they have sold. We also will support a few amendments to the bill.

There may be reasonable differences of opinion on whether or not there is present or imminent danger of serious injury to the creator of the computer programs posed by lending operations. We don't have much direct experience to consider. We have few hard facts before us. Even so, the Copyright Office supports this legislative effort for computer programs because we see a strong analogy between this market and the sale and rental market for sound recordings.

In both cases, under present technology, it is our hunch that rentals almost always displace sales, and this damages the legitimate sales market. The price differentials between rental and sale are considerable, and we can assume the great appeal of copying through rentals.

Of course, Mr. Chairman, if you do want hard statistical evidence before you move ahead, the Copyright Office would be happy to study the problem—study the extent of copying and study the impact of this copying on the software industry. We could also study the feasibility of alternative approaches to protection, such as shrink wrap licenses, and anticopying devices.

Of course, as you well remember, Congress enacted the Record Rental Act of 1984 without an exhaustive study, basing its decision on its own instincts and on your own sense of fair play. I would think that the same could be done safely in this case, as well.

The Copyright Office also favors some type of exemption for nonprofit libraries and schools similar to that applicable to record rentals.

I'm told that the parties have reached an agreement in principle on this point. The software manufacturers, the librarians, and the educators have proposed language on a nonprofit lending exemption to S. 198, but I have not yet seen the actual language. From what I have heard of it, though, it sounds reasonable and acceptable.

The Copyright Office is ready to lend its support in studying and assessing the effects of lending of computer programs either before or after the legislation is enacted.

I'd like to wind up, Mr. Chairman, with one final point—it is really a request for clarification more than anything else. Unlike the Record Rental Act, S. 198 does not contain any express sunset language. But, as you know, the bill proposes to amend section 109(b) of the Copyright Act, which is the section created by the Record Rental Act. As an amendment to section 109(b), it is arguable that the computer rental provisions will expire or sunset at the same time the rest of section 109(b) expires; however, there are some strong arguments that suggest that computer rental provisions will retain their vitality since S. 198 does not contain any express sunset language that is contained in another part of the code.

The Copyright Office would favor clarification of this point by either amending the bill to include a sunset provision or a statement that it shall expire concurrently with the rest of section 109(b) or by including a statement, either in the bill or in the report, that the computer rental provisions are, in fact, a permanent feature of the Copyright Act.

That concludes my statement, Mr. Chairman. I would be pleased to answer any questions.

[The prepared statement of Mr. Oman follows:]

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS AND
ASSISTANT LIBRARIAN OF CONGRESS FOR
COPYRIGHT SERVICES

BEFORE THE SUBCOMMITTEE ON
PATENTS, COPYRIGHTS AND TRADEMARKS
SENATE COMMITTEE ON THE JUDICIARY
101st Congress, First Session
April 19, 1989

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you today to present the views of the United States Copyright Office regarding S. 198, the Computer Software Rental Amendments Act of 1989. The bill is modeled after the Record Rental Act of 1984 and proposes to amend section 109 of the Copyright Act by making it an act of copyright infringement for a person to rent, lend or lease copies of computer programs to another for purposes of direct or indirect commercial advantage without the authorization of the copyright owner.

1. Computer Program Rental and the Copyright Law.

The explosion in the development and use of computers and computer programs in recent years gives rise to concerns about creation of a balanced system of intellectual property rights in computer programs to protect the legitimate interests of software manufacturers, creators and consumers. Computers have become a part of our everyday lives, and the computer industry has risen to fill the need for sophisticated programs which can perform complicated tasks and collect and analyze information in a fraction of the time it would take by hand. Computer software, or programs, are the result of many hours of intellectual labor and creativity and are the essence of what makes computers so valuable to the user.

Computer programs are stored or fixed on different types of memory devices. One such device is an internal permanent memory device, called a ROM (Read Only Memory), which is incorporated into the circuitry of the CPU (Central Processing Unit). Once the program is fixed in the ROM, the CPU is able to read it and carry out the functions of the program. Another program storage or fixing device is the magnetic disk. Computers can read disks once they are inserted into the CPU. The disks are usually small and quite compact, and are far more portable than a ROM. The computer program stored on the magnetic disk can be copied quite simply, inexpensively and quickly by inserting it into the CPU and using the copying mechanism available in the CPU.

Software rental companies have now emerged. For a fraction of the cost of a computer program, a person or business can rent the program for a limited time and return it to the lessor, much in the same fashion as renting a movie videocassette for home viewing. But, unlike the situation with respect to videocassettes--and perhaps more closely akin to sound recordings--copying of the work by the lessee or renter is easy, inexpensive, and likely.

While the leasing or renting of computer programs is clearly a profitable exploitation of the program producer's labor, it is not an infringement of the copyright in the program, if the copyright owner authorizes the sale of copies. The purchaser who acquires ownership of a copy may redistribute the copy by sale, lease, or rental, without the consent of the copyright owner. This principle, now found in section 109 of the Copyright Act, is known as the "first sale" doctrine.

With the tremendous growth occurring in the computer industry, there has been a corresponding proliferation of computer programs. These programs perform a wide variety of tasks and functions, from simple mathematical computations and games to sophisticated organizational and word processing capability. The commercial vitality of most programs is relatively short lived. New versions are created that embody significant improvements to programs and lead to the development of new and better systems. There are also a number of programs, created by academics and so-called "computer whizzes," which have been purposely dedicated to the public domain.[1]

Creating computer programs, particularly those that perform complex functions, is an expensive undertaking, frequently reaching into the millions of dollars. Lofty research and development expenses necessitate a significant retail cost for a program so that software producers can amortize their expenses and continue to be profitable. For example, the computer program WordPerfect, which is a very popular and successful word processing program, may retail for around $495. However, a number of software rental companies, operating primarily via mail order, have sprung up and will, in most cases, rent the WordPerfect program to consumers for around $35. Even if the retail price is discounted by $100-$150, there is a large difference between the retail sales price and the rental price. Because of the relative ease with which the consumer can copy the program onto a magnetic disk and the disparity between the sales and rental prices, software manufacturers have become concerned about copying and the corresponding loss of potential sales due to the activities of the rental firms.

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[1] Apparently there even exist business firms which identify, organize, and collect computer programs in the public domain and sell them to consumers for a fee. See, Computer Software Rental Amendments Act: Hearing Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary, 100th Cong., 2d Sess. (August 24, 1988).

The Copyright Act categorizes computer programs as literary works. As such, copyright owners of computer programs are granted the exclusive rights found in section 106 of the Act, which include the right to distribute copies of a computer program to the public by sale, rental, lease or lending. These section 106 exclusive rights for computer programs are limited, however, by the special provisions for computer programs found in section 117, as well as by the "first sale" doctrine of section 109.

Section 117 provides that it is not an infringement of copyright for the owner of a copy of a computer program to make or authorize the making of another copy of that program if 1) the new copy or adaptation was created as "an essential step in the utilization of the computer program in conjunction with a machine and ... it is used in no other manner," or 2) the new copy or adaptation is "for archival purposes only and ... all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful." The section also permits the lease, sale or transfer of the new exact copy in connection with a transfer of all the rights in the program. Adaptations of the program can only be transferred with the authorization of the copyright owner of the original program.

There is currently no provision in the copyright laws that prevents a person or business from purchasing a computer program and then renting that program to other parties for a fee. Although section 106(3) of the Copyright Act grants a copyright owner the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer or by rental, lease or lending," section 109(a) exhausts the distribution right in a particular copy of a work once ownership of it has been relinquished. The section states:

> Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.[2]

Thus, if the owner of a copyright has relinquished all title in the physical copy of the work, the copyright law does not allow him/her to restrict the disposition of that copy. If, however, the copyright owner retains ownership, such as by transferring possession only through lease, loan, license or similar means, then the provisions of section 106(3) still apply.

Many software producers attempt to license the right to use the software without selling any rights in the physical copy of the work. These agreements are probably effective when the contracts are individually negotiated. In the case of mass-marketed programs, many software producers attempt to use a form of a licensing agreement called a "shrink wrap" agreement, which is discussed more fully later.

2. Analysis of Senate Bill 198.

The "Computer Software Rental Amendments Act of 1989," introduced by Senator Hatch, seeks to restrict application of the "first sale" doctrine to computer programs. The bill closely tracks the Record Rental Amendments

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[2] 17 U.S.C. §109(a)(1978).

Act of 1984, now found at Section 109(b) of the Copyright Act, with two significant exceptions: 1) S. 198 does not contain exceptions for nonprofit libraires and educational institutions; and 2) S. 198 does not contain a sunset provision, but instead would become a permanent provision of the Copyright Act.

S. 198 proposes to amend Section 109(b) of the Copyright Act in the following fashion. First, in subsection (b)(1), which currently grants the copyright owners of sound recordings the right to authorize leasing, renting or lending by owners or possessors of particular copies of the works, S. 198 amends the section to include owners of computer programs. A copy of a computer program is defined to include any tape, disk or other medium embodying a program. Second, S. 198 amends subsection (b)(3), which currently makes it an act of infringement to distribute a phonorecord in violation of subsection (b)(1), to include also copies of computer programs.

There are, however, two circumstances where S. 198 deviates from the record rental provisions of the Copyright Act. Section 109(b)(1) currently states that it shall not apply "to the rental, lease or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution." This proviso is missing from S. 198. Also absent from S. 198 is a sunset provision. The Record Rental Act was passed for a period of five years, and was extended for another eight years this past fall by the 100th Congress. If enacted, S. 198 would become a permanent feature of the Copyright Act.

3. Arguments in Favor of a Software Rental Right.

Computer program interests contend that there are compelling economic reasons for enactment of S. 198. Widespread illegal copying of computer programs facilitated through inexpensive rentals could seriously damage software producers' revenue base and reduce the incentive to develop and create new programs. These concerns must be balanced against the goal of promoting the availability of computer programs to the public, since such programs are recognized by the copyright law as literary works and represent valuable resources of information. These two propositions are not necessarily in conflict.

Software producers' premise their claims on the argument that rental of computer programs could facilitate, if not actively promote, unrestricted copying of programs by lessees. Computer programs, unlike movie videos or records, cannot realistically be rented for an evening's entertainment and then returned. The various commands and features of a computer program require mastery of complex user manuals which often run several hundred pages in length. Furthermore, many programs have no real value to users until the user enters his/her own database. Thus, the program is generally not in and of itself an object for browsing, casual enjoyment, or performance, like a movie video, but rather is a tool for processing data and information and producing an end product. Program copyright owners assert it is therefore unlikely for a person to rent a program for a few days, learn its functions, enter his/her data to perform one or two tasks, and then return the program. The ease with which the program may be copied, and the usefulness of retaining the program and database entered solely during a short rental period, increases the likelihood that rental will result in unauthorized copying to the detriment of the copyright owner.

Copyright owners also argue that lost sales to the software industry due to computer program rentals represent a significant financial concern now and may increase in years to come if the rental industry continues to grow. These losses, it is argued, are potentially greater than those faced by the record industry back in 1984 when Congress was considering the Record Rental Act. The recording industry testified then that a typical compact disk might sell for between $15-$18 and rent for around $2-$5; the disks might cost many thousands of dollars in developmental costs to bring to the marketplace. The numbers for computer programs, however, are much higher. For example, a program such as WordPerfect may retail for around $495 (or $350-$395 if discounted) and represents several million dollars in research and developmental costs. Yet, WordPerfect can be rented for around $35, representing a large disparity between the retail and rental price. A person renting WordPerfect and subsequently copying the program, at no cost, saves several hundred dollars. This significant disparity between retail and rental price further increases the incentive to copy the program. The sale of the program represents considerable revenue to the software manufacturer, and each time a person rents and copies the program rather than purchasing it, that revenue is lost.

When Congress enacted the record rental right, the danger of widespread, unauthorized copying was even less clear than in the case of computer software. Now we see an even greater price discrepancy between purchase and rental. There is greater temptation to copy the program for future use and experimentation. Copying is easier and quicker. The authorized and unauthorized copies are more clearly fungible. Therefore it is even more likely that computer programs will be widely copied than was true of sound recordings.

S. 198 would not completely ban program rentals, but would vest software owners with the power to decide whether or not to permit rentals of their programs.

Rental of computer programs has received attention in international copyright circles as well. In June of last year, the Commission of the European Communities issued a "green paper" on "Copyright and the Challenge of Technology." An entire chapter was devoted to computer program protection. As a means of adopting and implementing the policy positions expressed in the green paper, a proposed directive was issued by the Council of the European Communities. Among the exclusive rights granted to the copyright holder of a computer program in Article 4 of the directive would be the right to authorize "the distibution of a computer program by means of sale, licensing, lease, rental and the importation for these purposes." Article 4, subparagraph (c). However, the directive proposes to exempt nonprofit public libraries from the rental limitation of Article 4.[3] Adoption of a software rental right will clearly facilitate foreign protection of U.S. software. Conversely, if we fail to enact a software rental right, other countries may similarly decline to protect software in this way, or, if they enact protection, opt for sui generis protection for software so they can impose reciprocity as a condition of protecting U.S. software.

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[3] Article 5 only exempts libraries that are nonprofit and public. Section 109(b)(1) of the U.S. Copyright Act only requires that the library be nonprofit. The directive makes no exception for educational institutions.

4. Arguments Against a Software Rental Right.

In opposition to a change in the "first sale" doctrine with respect to computer programs, some argue that unrestricted rental of software serves a valuable social purpose. Several computer consulting firms and software houses match the needs of their clients as closely as possible to existing computer hardware and software and then "customize" these packages by writing routines to connect the functions of different packages or to simplify data entry for a specific application. These adaptations of the software are arguably justified either under the specific adaptation privilege of section 117 or under fair use.[4]

The quality of the custom package is enhanced by the ability of the organizer to choose different parts of the system from different vendors. These systems come with maintenance agreements for the length of the lease and the offering firm will service both the hardware and software of the system. The likelihood of copying is reduced to a minimum because both the hardware and the software are rented to the consumer for the same amount of time. These types of arrangements, often referred to as "turnkey" systems, are quite valuable, particularly in an era of rapid development in both hardware and software. If software owners are allowed to control rentals, packages containing the works of various competing companies are likely to be nonexistent, thus reducing the availability and quality of the packages.

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[4] Copyright owners may not agree that these adaptations are justified by section 117 or fair use.

Computer program rentals also occur at the retail level. Software retail outlets often permit customers to rent programs on a "trial" basis so that customers have the time to examine and work with the various features of a program to decide whether or not to purchase it. Rental restriction could interfere with this practice, lessen customer information, and reduce the ability of software retailers to sell their inventories. These concerns, however, might be alleviated by the now developing practice of allowing customers to try programs within the confines of the retail store. This recent practice of allowing and encouraging the customer to engage in in-store trial of programs appears likely to continue as a means of aggressively marketing software. If this occurs, the impact of possible rental controls by the producers would arguably be less significant. After all, the retail merchants of the software have an obvious stake in eliminating opportunities for copying that displace sales.

One of the justifications for giving software owners the right of control over rentals is to prevent the genesis of a software rental industry similar to that which now exists for movie videos. Software producers argue that a cottage industry devoted to rental of computer programs has already begun and will soon explode, resulting in a proliferation of rental stores and firms that would deal a serious blow to software retail sales.

Not everyone, however, is as convinced as the software producers that there is an impending explosion in the rental business. When Congress considered record rental legislation in 1984, computer interests sought coverage, citing at that time the impending threat of a computer program rental industry. It is now five years later, and rental firms have not proliferated as was predicted.

One explanation for this absence of rentals is that software manufacturers do have legal protections outside of copyright--namely through contract. In an effort to circumvent the "first sale" doctrine, software producers use licensing agreements. By licensing software instead of selling it, software owners allegedly retain ownership and therefore can limit the buyer's right to lease or rent the software to a third party. One type of license used by software manufacturers -- especially in the case of mass-distribution -- is referred to as a "shrink-wrap" license. The license operates as follows:

> The shrink-wrap license provides that a user who breaks the seal of the software's cellophane package or uses the program is bound by the terms and conditions of the license agreement included in the package with the software. Under a shrink-wrap license arrangement, therefore, the user's act of opening the software package allegedly constitutes the user's acceptance of the terms of the license.[5]

The ability of shrink-wrap licenses to withstand judicial scrutiny is debatable, particularly with respect to the consumer, since they are unilateral agreements and adhesional in nature. To date, there are no reported cases addressing the enforceability of shrink-wrap licenses. At least one state, however, has adopted legislation providing that shrink-wrap licenses are binding and enforceable provided that certain conditions are met.[6] If shrink-wrap licenses were clearly enforceable under state law, then the justification and need for legislation curtailing the first sale doctrine would be weakened, even though one could argue that a state remedy alone is a poor substitute for a clear national standard that one could enforce in federal court.

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[5] Note, The Protection of Computer Software Through Shrink-Wrap License Agreements, 42 Wash. & Lee L. Rev. 1347, 1350 (1985).

[6] See, LA. REV. STAT. ANN. §§51:1963-65 (West 1985). Several aspects of this law have been adjudicated by the 5th Circuit as being preempted by the federal copyright laws. See, Vault Corp. v. Quaid Software Ltd, 847 F.2d 255 (5th Cir. 1988). This case did not, however, address the enforceability of shrink wrap licenses under state law.

Aside from possible legal protections available to software manufacturers, there exists the potential for mechanical protection devices. It is possible to embed anti-copying codes in computer programs to prevent the user from making copies of the program. There are numerous versions of this procedure, with one example being a serial number embedded on each copy of a program which allows the software user to utilize the program only with a computer having a corresponding number.

All of these anti-copying methods, however, have been far from successful. One problem is that these protections can be overcome by the user with code breaking disks or by altering the objective code of the program. Another more serious problem has been the complaints of consumers who need to make copies of legitimately purchased programs in the event of system failure or "crashing." Sensitivity to these complaints, particularly from corporate clients, has led to the virtual elimination of copy code protections in most computer software.

An aspect missing from S. 198, which is found in the record rental provisions of the Copyright Act, is a provision exempting nonprofit libraries and educational institutions from the bill's rental limitations. These institutions would presumably oppose any decision to vest complete and absolute rental control with the software copyright owners. If no copies of a computer program could be lent or leased without authorization, then every person who wished access to the program could be required to purchase a copy. The first sale doctrine is a valuable and important limitation on the rights of a copyright owner. It has never been the position of Congress or the courts that the copyright holder should have absolute control over the distribution and transfer of a copyrighted work after its sale. The Record Rental Act gave record owners considerable control over transfer of their works, but it still permitted the public to obtain the works from libraries and educational institutions. Access to information is not limited to books, but rather encompasses all media where information and knowledge are collected. A nonprofit lending exemption might be advisable to ensure access to knowledge and information, relying, of course, on the libraries to fulfill their obligations under the copyright law.

5. Views of the Copyright Office.

The Copyright Office supports legislation to grant copyright owners a right to control the commercial lending of copies of computer programs that they have sold. We do so, however, with certain qualifications, which lead us to suggest certain amendments for your consideration.

First, there may be reasonable differences of opinion on whether there is present or imminent danger of serious injury to the legitimate interests of copyright holders in computer programs posed by lending operations now legitimate under the first sale doctrine. There is not much direct experience for us to consider. We have few hard facts.

The Copyright Office supports this legislative effort because we see in the relationship between the sale and rental markets for programs a significant similarity to the area of sound recordings. In both cases, under present technology, rentals almost always displace sales with damage to the legitimate market for sales of copies of works. The price differentials between rental and sale are considerable and the appeal of copying through rental can be safely presumed to be great.

Computer rentals pose a threat not only to copyright owners in the programs themselves, but to segments of the retail computer industry which rely on the sale of programs to the public. Many if not most computer programs are intended for repeated use over a substantial period of time and ownership of a copy of a program is what most consumers seek. Retail prices of computer programs, certainly those intended for personal computing, are often heavily discounted, and the market environment for programs ought to encourage the lowest possible sales price for copies of programs. Widespread unauthorized and uncompensated rental of programs could force up sales prices as manufacturers attempt to amortize their considerable investment and recover profits from lost sales due to rental. This would be an unfortunate development, and could hurt the general public, especially those who purchase the programs.

The Copyright Office would, however, also support a decision of Congress to commission a study as to the current extent of copying resulting from rental of computer programs and its impact on the software industry, and of the feasibility of alternative approaches to protection such as shrink-wrap licenses and anti-copying devices. The Office stands ready to conduct such a study or render any assistance requested. Of course, Congress enacted the Record Rental Act of 1984 without an exhaustive study, basing its decision on its own instincts and sense of fair play.

Second, the Copyright Office also favors some type of exemption for nonprofit libraries and certain educational institutions similar to that applicable to record rental.

An agreement has apparently been recently reached in principle between software manufacturers and library/educational institution representatives regarding a nonprofit lending exemption in S. 198. The agreement reportedly contains three major points. First, the software rental right of S. 198 would be qualified by an exemption for nonprofit libraries, including libraries in educational institutions. Second, in exchange for an exemption, libraries will be required to include a warning regarding the copyright law prohibitions on copying when they lend a computer program. The notice will presumably be similar to that now required to be displayed by libraries on their photocopying machines. Third, S. 198 may include a provision requiring the Copyright Office to review the legal and economic impact of library lending of computer programs and report its findings to Congress three years after the bill is enacted into law. If Congress decides to make this change, the Copyright Office urges instead that Congress fold the study into the already mandated 5-year Report on Library Photocopying.

The apparent agreement between software manufacturers and library and educational interests on this matter seems reasonable and acceptable. Again, the Copyright Office is ready to lend its support in studying and assessing the effects of library lending of computer programs, either before or after legislation is enacted.

SUMMARY OF RALPH OMAN'S STATEMENT

S. 198, the Computer Software Rental Amendments Act of 1989, is modeled after the Record Rental Act of 1984 and proposes to amend section 109 of the Copyright Act by making it an act of copyright infringement for a person to rent, lend or lease copies of computer programs to another for purposes of direct or indirect commercial advantage without the authorization of the copyright owner.

The Copyright Office supports legislation to grant copyright owners a right to control the commercial lending of copies of computer programs that they have sold. We do so, however, with certain qualifications, which lead us to suggest certain amendments for your consideration.

There may be reasonable differences of opinion on whether there is present or imminent danger of serious injury to the legitimate interests of copyright holders in computer programs posed by lending operations now legitimate under the first sale doctrine. There is not much direct experience for us to consider. We have few hard facts.

The Copyright Office supports this legislative effort because we see in the relationship between the sale and rental markets for programs a significant similarity to the area of sound recordings. In both cases, under present technology, rentals almost always displace sales with damage to the legitimate market for sales of copies of works. The price differentials between rental and sale are considerable and the appeal of copying through rental can be safely presumed to be great.

The Copyright Office would, however, also support a decision of Congress to commission a study as to the current extent of copying resulting from rental of computer programs and its impact on the software industry, and of the feasibility of alternative approaches to protection such as shrink-wrap licenses and anti-copying devices.

The Copyright Office also favors some type of exemption for nonprofit libraries and certain educational institutions similar to that applicable to record rental. An agreement has apparently been recently reached in principle between software manufacturers and library/educational institution representatives regarding a nonprofit lending exemption in S. 198. The apparent agreement between software manufacturers and library and educational interests on this matter seems reasonable and acceptable.

Senator **DeConcini**. Thank you very much, Mr. Oman.

Ms. Schrader, do you have any comments?

Ms. **Schrader**. No, sir. Not at this time.

Senator **DeConcini**. Mr. Oman, I just have one question. We passed the Record Rental Act in 1984, as you mentioned, and now we are doing something on computer software. Do you anticipate other copyright technologies, either in the market or in development, that will also need protection from rental?

Mr. **Oman**. Certainly we've already explored the possibility of extending rental protection to the motion picture industry, and I think you've decided that is not called for at this time.

Senator **DeConcini**. Yes. Any place else?

Mr. **Oman**. In terms of other high technologies, it is difficult to predict what is coming down the road, but I would think that if there is a technology that requires a great deal of capital expense to put the product on the market, that there would be strong economic incentives to rent and thereby undermine the legitimate sales market and that other industries would come in asking for similar support.

Senator **DeConcini**. You don't anticipate anything? You don't know of anything that is out there under development or could fall into this category?

Mr. **Oman**. We're not aware of any "rough beast, its hour come round at last, slouch[ing] toward Bethlehem to be born."

Senator **DeConcini**. Thank you.

Senator Hatch?

Senator **Hatch**. I have no questions. I'm happy for your testimony and happy to have your support of the bill.

Senator **DeConcini**. Thank you very much.

Mr. **Oman**. Thank you very much.

Senator **DeConcini**. Our first panel will be: Heidi Roizen, president, Software Publishers Association; Mr. Jon Shirley, president of Microsoft Corp. who has already been introduced; and Ms. Luanne James, executive director, Computer Software and Services Industries Association.

We'll start with Ms. Roizen.

As I indicated, your full statements will be put in the record. Please summarize them for us in 5 minutes or less. Thank you.

PANEL CONSISTING OF HEIDI ROIZEN, PRESIDENT, SOFTWARE PUBLISHERS ASSOCIATION, WASHINGTON, DC; JON SHIRLEY, PRESIDENT, MICROSOFT CORP., REDMOND, WA; AND LUANNE JAMES, EXECUTIVE DIRECTOR, ADAPSO, THE COMPUTER SOFTWARE AND SERVICES INDUSTRIES ASSOCIATION, ARLINGTON, VA

STATEMENT OF HEIDI ROIZEN

Ms. **Roizen**. Mr. Chairman and other distinguished members of the subcommittee, my name is Heidi Roizen, and I am delighted to testify in favor of swift enactment of S. 198, the Software Rental Amendments Act of 1989.

I testify today in three capacities. First, I offer testimony as an individual entrepreneur who has been involved for many years in the exciting challenges and opportunities of the rapidly growing field of computer software.

Second, I am testifying as an executive of a small software company with a limited number of products who recognizes the vulnerability of my company to the devastating potential for unauthorized commercial exploitation of our products. My company, T/Maker, with only 14 employees, produces a word processor for the Macintosh computer.

The third capacity in which I offer testimony is as president of the Software Publishers Association, the principal trade group in the microcomputer software industry. SPA represents 450 companies that develop and market software for microcomputers. SPA's member companies offer innovative business, recreational, and educational software.

As I am sure you are aware, the United States leads the world in software technology. This lead will continue, however, only if strong copyright laws exist. Bill 198 will strengthen our laws by giving copyright holders the right to restrict the commercial rental or lending of our software.

Most software companies are small businesses. In fact, more than one-half of SPA's 450 members have sales of less than $1 million per year. Further, like my company T/Maker, more than 80 percent of the software developers and publishers in the United States today have fewer than 15 employees. I have a particular concern whether these small businesses can survive if their products are exploited by commercial software rental shops.

I say this because I believe software rental businesses facilitate the unauthorized copying of valuable computer programs.

SPA is not concerned about noncommercial lending by nonprofit libraries. We have even agreed to help one nonprofit organization secure permission to lend software to the parents of handicapped children on a noncommercial basis. We are also not concerned about the rentals of video game cartridges. We are, however, very concerned about, and hope to restrict through passage of S. 198, the commercial rental of software which is designed to run on a personal computer.

Let me describe the damage caused by commercial rental of one particular software program. SoftView, Inc., an SPA member headquartered in southern California, produces a product called MacInTax. This is a very clever Federal income tax preparation tool. The product asks the right questions, performs the necessary calculations, and then prints your return on an approved look-alike IRS 1040 form.

As you might expect, MacInTax is quite popular this time of year, and the selling season for the product is very short. I'm told that MacInTax is in such demand with software rental operations in the Los Angeles area that several actually have waiting lists of interested customers. We believe these rentals are just opportunities to copy software. It takes time to learn how to use the software package. This cannot happen with an overnight or 2-day rental. Moreover, applications like MacInTax are really only useful if you store data on them.

Again, it is difficult to believe that someone would rent a program like MacInTax, insert all their tax information, and then erase that same material before returning the diskette. What is really happening is that these programs are being copied by the people who rent them.

S. 198 gives software companies rights similar to those that exist for the recording industry. Computer technology is such that it is, in fact, faster and easier to make a quality copy of a software package than it is to make a quality copy of a sound recording. The temptation to copy software may be even greater because of the high retail cost of many popular programs.

Of course, what the user often forgets is the high cost of developing that program. Skilled programmers and software engineers are often needed to keep the programs up to date and bug free. These R&D and maintenance costs are much higher on average than the cost of producing a sound recording. We recognize, of course, that more and more potential customers of software are interested in trying out the product before buying it.

Once again, I can speak for hundreds of small software developers in asserting that we want to ensure that customers have the opportunity to make informed choices. We encourage this through in-store demonstrations, demonstration disks, and the advice of the dealer network. Software companies and dealers may also offer money-back guarantees. Clearly, the software industry is promoting a more informed customer purchase.

Commercial software rentals are sometimes defended on the basis of this "try before you buy" argument. The prices charged for these commercial rentals are generally too high to justify this claim. In most areas, you can rent videos and movies for $1.50 to $3 per day. Software rental outlets, on the other hand, may rent a program for 25 percent of the actual selling price.

It is easy to reach the logical conclusion that the true purpose of these high-priced software rentals is not "try before you buy," but rather to facilitate illegal copies.

Of course, under S. 198 any copyright holder would retain the right to allow and even encourage commercial rental of their products, but this should be their right, not something over which they have no control.

Without the protection of the Computer Software Rental Amendments Act of 1989 the software rental problem will grow. So far, the software industry has had to rely on moral suasion to prevent people from stealing our products through software rental. Moral suasion is not enough. What we need now is the legal protection available through this bill.

We urge you to show your support for the software industry by voting in favor of S. 198.

I would be happy to answer any questions you might have.

Thank you.

[The prepared statement of Ms. Roizen follows:]

Testimony of Heidi Roizen
President of T/Maker Company
Mountain View, California
President, Software Publishers Association
Hearing on S. 198
"The Computer Software Rental Amendments Act of 1989"
before the
Subcommittee on Patents, Copyrights and Trademarks
Committee on the Judiciary
April 19, 1989

Mr. Chairman, other distinguished members of the Subcommittee, I am delighted to once again testify in favor of swift enactment of software rental legislation, specifically S. 198, "The Software Rental Amendments Act of 1989". I had the privilege of presenting testimony on this same issue last August during field hearings in Provo, Utah.

I testify today in three capacities:

First, I offer testimony as an individual entrepreneur who has been involved for many years in the exciting challenges and opportunities of the rapidly growing field of computer software.

Second, I am testifying as an executive of a small software company with a limited number of products, who recognizes the vulnerability of my company to the devastating potential for unauthorized commercial exploitation of our products. My company, T/Maker produces a word processor for the Macintosh computer. Although my firm has only 14 employees, we compete directly with such industry giants as Microsoft, WordPerfect and a subsidiary of Apple Computer, called Claris.

The third capacity in which I offer testimony is as President of the Software Publishers Association (SPA), the principal trade group of the microcomputer software industry. SPA, which is celebrating its fifth anniversary, represents 450 companies that develop and market software for microcomputers. SPA's member companies offer innovative business, recreational, and educational software.

The growth of the Software Publishers Association from only two dozen members just a few short years ago, to the large number it now represents is testimony to the increasing importance of the United States microcomputer software industry. This country leads the world in software technology. This lead will continue, however, only if strong copyright laws exist. SPA believes that one slight improvement is needed in our current copyright law. That improvement as embodied in S. 198, the ability of the copyright holder to restrict the commercial rental or lending of software.

Most Americans are aware of the large and dominant companies in our industry. These companies, such as Ashton-Tate, Lotus Development, Microsoft, and WordPerfect are all SPA members. They have created thousands of jobs and become vital to their local economies. In my role as SPA President, I have worked closely with many distinguished individuals from these and other companies. As evidenced by Jon Shirley's testimony here today, these large microcomputer software companies concur with the concerns I express about the economic impact of commercial rentals of mass marketed software products.

It is important that the views of SPA's smaller business members are also presented to you. More than one-half of SPA's 450 members have sales of less than $1 million per year. Further, more than 80% of the software developers and publishers in the United States today have fewer than 15 employees.

The small companies I am describing are led by business men and women who are looking for an opportunity to grow. They embody the American spirit and the American dream. Our industry has many success stories, and I hope there will always be chances for committed software entrepreneurs to take single products or ideas and build businesses in this most dynamic industry. I question, however, whether any software entrepreneur, large or small, will be able to establish or maintain a strong position in the industry if their products are exploited by commercial software rental shops.

This brings me to the issue and the legislation at hand. It is vital that Congress allow software companies to control the commercial rental and exploitation of their products. Software rental businesses can undermine the fundamental stability of any software program and the company that produces it. This is true, because software rental businesses facilitate the unauthorized copying of these valuable products.

SPA is not concerned about noncommercial lending by nonprofit libraries. We have even agreed to help one nonprofit organization secure permission to lend software to the parents of handicapped children on a non-commercial basis. We are also are not concerned about rentals of video game cartridges. We are, however, very concerned about and hope to restrict through passage of S. 198, the commercial rental of software which is designed to run on a personal computer.

Commercial rentals have not become commonplace so far, but I cringe at the computer magazine ads I am beginning to see for mail order "rentals". In reality, these ads are nothing more than invitations to pay a fee, make a copy, and return the disk for someone else to do the same. Let me describe the damage caused by commercial rental of one particular software program.

SoftView, Inc., an SPA member headquartered in Southern California, produces a product called "MacInTax". This is a very clever federal income tax preparation tool. The product asks the right questions, performs the necessary calculations, and then prints your return on an approved look-alike IRS 1040 form. As you might expect, MacInTax is quite popular this time of year, and the selling season for the product is short. The market becomes almost nonexistent, however, when rental companies give users the opportunity to take MacInTax home, copy the program, and return the original to the rental shop. I am told that MacInTax is so popular with software rental operations in the Los Angeles area, that several actually have waiting lists of interested customers. SoftView is seriously affected by software rentals, and the firm has no legal means to restrict the practice. If the software rental industry is allowed to flourish, SoftView and its clever MacInTax program may not survive. SoftView is not alone, because every software company I know is concerned that the market for their products could be destroyed by unchecked software rentals.

In preparing to testify here today, I have become generally familiar with the adoption and recent extension of the record rental prohibitions. This law, as I understand it, was designed to prevent the problem of record rentals, and to inhibit the establishment and growth of rental stores before they became a serious threat to the recording industry. I believe that the Record Rental Amendment was an effective response to a new situation that had the potential for causing great harm.

As we face the 1990s and the 21st century, I believe it is imperative for Congress to act quickly and give software companies rights similar to those that exist for the recording industry. Computer technology is such that it is in fact faster and easier to make a quality copy of a software package than it is to make a quality copy of a sound recording. The temptation to copy software may be even greater, because of the high retail cost of many popular programs. Of course, what the user often forgets is the high cost of developing that program. Skilled programmers and software engineers are also needed to keep programs up-to-date and "bug" free. These R&D and maintenance costs are much higher, on average, than the cost of producing a sound recording.

The software industry needs the legal right to restrict rentals. It is not enough to say that industry can protect itself by attaching copy protection technology to every program. Legitimate customers of these programs find copy protection technology cumbersome, and they resent having to suffer this inconvenience in the interest of reducing unauthorized copying. Whereas a few years ago many software developers relied on copy protection, today, fewer and fewer are following this course.

In weighing the interests of the copyright holder versus rental operations, it is also important to discuss one other issue, "try before you buy". More and more potential customers of software are interested in trying out the product before buying it.

Once again, I can speak for hundreds of small software developers in asserting that we want, particularly given our limited number of products, to ensure that customers have the opportunity to make informed choices. We encourage this through in-store demonstrations, demonstration disks, and the advice of the dealer network. The nation's largest retailer of software, Egghead Discount software, permits customers to try out any product in the store. They also offer money back guarantees. Many customers, uncertain as to which product to choose, take advantages of Egghead's policy. Other companies send out demonstration disks, which allow a potential user to examine a program's features without being able to copy it. In both instances, the software industry is promoting a more informed customer purchase.

Commercial software rentals are sometimes defended on the basis of this specious "try before you buy" argument. The prices charged for these commercial rentals are generally too high to justify this claim. In most areas, you can rent videos and movies for $1.50 to $3.00 a day. Software rental outlets on the other hand, may rent a program for 25% of the actual selling price. It is easy to reach the logical conclusion that the true purpose of these high priced software rentals is not "try before you buy", but rather to facilitate illegal copying. Of course, under S. 198, any copyright holder would retain the right to allow and even encourage commercial rental of their products, but this should be their right, not something over which they have no control.

Without the protection of the Computer Software Rental Amendments Act of 1989, the software rental problem will grow, and the most serious impact will be felt by small companies like mine, which are dangerously vulnerable to theft of our products. Large software companies like WordPerfect, Lotus and Microsoft are equally entitled to be compensated for each and every copy of their products.

Our industry's exports make a very substantial positive contribution towards reducing this country's negative balance of payments. We are, however, an industry without the necessary legal means to protect our most valuable assets. This nation's copyright laws are good, but they need to be bolstered through passage of S. 198. So far, the software industry has had to rely on moral suasion to prevent people from stealing our products through software rentals. Moral suasion is not enough. What we need now is the legal protection available through this bill.

We urge you to show your support for the software industry by voting in favor of S. 198. I would be happy to answer any questions you may have. Thank you.

SUMMARY OF

Statement of Heidi Roizen
President, T/Maker Company
President, Software Publishers Association

The United States leads the world in software technology. This lead will continue, however, only if strong copyright laws exist. S. 198, will strengthen our laws by giving copyright holders the right to restrict the commercial rental or lending of software.

Most software companies are small businesses. In fact, more than one-half of SPA's 450 members have sales of less than $1 million per year. Further, more than 80% of the software developers and publishers in the United States today have fewer than 15 employees. These small business may not survive if their products are exploited by commercial software rental shops.

We believe these "rentals" are just opportunities to copy software. It takes time to learn how to learn how to use a software package. This cannot happen with an overnight or two-day rental. Moreover, most applications are really only useful if you store data on them. Again, it is difficult to believe that someone would rent a computer program, insert all their data, and then erase that same material before returning the diskette. What is really happening is that these programs are being copied by the people who "rent" them.

SPA is not concerned about noncommercial lending by nonprofit libraries. We have even agreed to help one nonprofit organization secure permission to lend software to the parents of handicapped children on a non-commercial basis. We are also are not concerned about rentals of video game cartridges. We are, however, very concerned about and hope to restrict through passage of S. 198, the commercial rental of software which is designed to run on a personal computer.

S. 198 gives software companies rights similar to those that exist for the recording industry. Computer technology is such that it is in fact faster and easier to make a quality copy of a software package than it is to make a quality copy of a sound recording. The temptation to copy software may be even greater, because of the high retail cost of many popular programs. Of course, what the user often forgets is the high cost of developing that program. Skilled programmers and software engineers are also needed to keep programs up-to-date and "bug" free. These R&D and maintenance costs are much higher, on average, than the cost of producing a sound recording.

Without the protection of the Computer Software Rental Amendments Act of 1989, the software rental problem will grow. So far, the software industry has had to rely on moral suasion to prevent people from stealing our products through software rentals. Moral suasion is not enough. What we need now is the legal protection available through this bill.

We urge you to show your support for the software industry by voting in favor of S. 198.

Senator DeConcini. Thank you, Ms. Roizen.

Mr. Shirley, If you'd like to proceed after that fine introduction, please go ahead. We will have your bio printed in the record.

STATEMENT OF JON SHIRLEY

Mr. Shirley. Thank you, Mr. Chairman. I appreciate the opportunity to appear today in support of S. 198.

I'd like to begin by adding a few additional facts about my company, Microsoft Corp. A little over 14 years ago we developed our first product, a basic interpreter made for the first commercially available personal computer in the United States. Today we are a company with over 3,800 employees offering consumers scores of products which generate currently over $800 million a year in annual revenues, making us the largest microcomputer software company in the world. We are continuing to grow at rates exceeding 20 percent per year.

Our contribution to the U.S. economy is even more impressive in that 50 percent of our business last year came from sales abroad. That meant badly needed dollars flowing into the U.S. economy to reduce our national trade deficit.

Mr. Chairman, in the face of such impressive statistics you may ask why we and our competitors feel the need of help from Washington. The answer is simple.

I hold in my hand a 5-inch square of plastic which contains one of our products. This piece of plastic is not our product; it contains our product. The product, itself, is something you cannot see or touch. It consists of a series of zeros and ones, called computer object code, electronically recorded onto the floppy disk. In short, what we at Microsoft produce is intellectual property, which only has value as long as the copyright laws of the United States and other nations give us the right to receive payment when it is copied and used.

S. 198 is a modest amendment to the Copyright Act which is designed to close a potentially disastrous gap in the copyright safety net on which our entire industry depends.

Mr. Chairman, 5 years ago this subcommittee recognized the grave danger to the copyright system presented by the combination of sophisticated recording technology and the then embryonic practice of rental of sound recording. On the recommendation of you and your fellow subcommittee members, the Senate and Congress moved quickly to give record companies the ability to protect their copyrights.

Like the record industry in 1984, we in the software industry are beginning to experience real problems with the rental of software; however, our products sell for several hundred dollars and can be copied in seconds instead of the hour necessary to record a $17 compact disk.

The software rental problem has grown even during the short period of time since Senator Hatch first introduced legislation last August. I'd like to give a couple of examples.

A few months ago Microsoft contacted the proprietor of a rental shop in Florida and we asked him to refrain from renting our products. He responded that a half dozen other businesses in his area were also renting our products. He said, "When you get them to stop, I'll stop."

We found rental operations in California and Texas which claim to carry over 700 different microcomputer programs. And we are now starting to receive calls from our legitimate dealers asking how they can possibly compete with the rental business, which is providing software that can be copied instead of sold.

The price of software today reflects actual costs of research and development, as well a the cost of creating and operating the kind of distribution service system required to meet the needs of consumers. These costs are increasing, rather than decreasing.

Last year Microsoft spent $87 million on research and development, alone—over 12 percent of our total sales. Every day the competition to develop the next generation of products gets tougher.

We, at Microsoft, are prepared to meet the challenge and continue as a leader of one of America's most promising new industries; however, we cannot grow, we cannot create new jobs—or even keep the ones which already exist—if an uncontrolled rental market is allowed to take root and devour us.

Mr. Chairman, the problem is worldwide in scope. A recent draft directive of the Commission of the European Communities has recommended to its members countries that they amend their copyright laws along the lines of S. 198.

I hope that you will take note of the fact that we are not asking you to change the law to prohibit the rental of software. We are asking only that the right to authorize rental be given to copyright owners. Should there be a legitimate need or consumer demand for the rental of software, such a need can and will be satisfied by us; however, we will retain the right to participate in that market and will not have our products taken from us.

On behalf of all the employees of Microsoft Corp. and its sister software companies, I want to thank you for giving us this opportunity to state our case and urge speedy enactment of S. 198.

[The prepared statement of Mr. Shirley follows:]

TESTIMONY OF JON A. SHIRLEY
PRESIDENT AND CHIEF OPERATING OFFICER
MICROSOFT CORPORATION

Before the Subcommittee on Patents, Copyrights
and Trademarks, U.S. Senate
April 19, 1989

Mr. Chairman and Members of the Subcommittee,

Thank you for the opportunity to appear today in support of S.198.

If I may, Mr. Chairman, I would like to begin by telling the subcommittee something about my company, Microsoft Corporation.

A little over 14 years ago, Microsoft developed its first product, the BASIC Interpreter, made for the first commercially available personal computer in the United States. Today we are a company with over 3800 employees offering consumers scores of products which generate over $800 million in annual revenues -- making us the largest microcomputer software company in the world. We continue to grow at rates exceeding 20 percent per year. Microsoft's contribution to the U.S. economy is even more impressive in that 50 percent of our business last year came from sales abroad. That meant badly needed dollars flowing into the U.S. economy to reduce our national trade deficit.

Mr. Chairman, in the face of such impressive statistics you may ask why we and our competitors feel the need of help from Washington? The answer is simple. I hold in my hand a five-inch square of plastic which contains one of our products. This piece of plastic is not our product. It contains our product. The product itself is something that you cannot see or touch. It consists of a series of zeros and ones -- computer object code -- electronically recorded onto the floppy disk. In short, what we at Microsoft produce is intellectual property, which only has value as long as the copyright laws of the United States and other nations give us the right to receive payment when it is copied and used. S.198 is a modest amendment to the Copyright Act which is designed to close a potentially disastrous gap in the copyright safety net on which our entire industry depends.

Mr. Chairman, five years ago this subcommittee recognized the grave danger to the copyright system presented by the combination of sophisticated recording technology and the then-embryonic practice of rental of sound recordings. On the recommendation of you and your fellow subcommittee members, the Senate and the Congress moved quickly to give record companies the ability to protect their copyrights.

Like the record industry in 1984, we in the software industry are beginning to experience real problems with the rental of software. However, our products retail at several hundred dollars and can be copied in seconds instead of the hour necessary to record a $16.95 compact disc. The software rental problem has grown even during the short period of time since Senator Hatch first introduced legislation last August. Let me give you a few examples.

A few months ago Microsoft contacted the proprietor of a rental shop in Florida. When asked to refrain from renting our products, he responded that a half dozen other businesses in his area were also renting Microsoft products. He said, "When you get them to stop, I'll stop." We have found rental operations in California and Texas which claim to carry over 700 different microcomputer programs.

We are now beginning to receive calls from legitimate dealers asking how they can possibly compete with the rental businesses which are providing software which can be copied instead of sold.

Mr. Chairman, the price of software today reflects actual costs of research and development as well as the costs of creating and operating the kind of distribution and service system which meets the needs of consumers. And -- those costs are increasing rather than decreasing. Last year Microsoft spent $87 million on research and development alone -- over 12 percent of our total sales. Every day the competition to develop the next generation of products gets tougher. We at Microsoft are prepared to meet the challenge and to continue as a leader of one of America's most promising new industries. However, we cannot grow, create new jobs or even keep the ones which already exist, if an uncontrolled rental market is allowed to take root and devour us.

Mr. Chairman, the problem is worldwide in scope. A recent draft directive of the Commission of the European Communities has recommended to its member countries that they amend their copyright laws along the lines of S.198.

Mr. Chairman and Members of the Subcommittee, I hope that you will take note of the fact that we are not asking you to change the law to prohibit the rental of software. We are asking only that the right to authorize rental be given to copyright owners. Should there be a legitimate need or consumer demand for the rental of software, such a need can and will be satisfied by us. However, we will retain the right to participate in that market, and we will not have our products taken from us.

On behalf of all the employees of Microsoft Corporation and its sister software companies, I want to thank you for giving us this opportunity to state our case and urge speedy enactment of S.198.

SUMMARY OF
TESTIMONY OF JON A. SHIRLEY
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Five years ago the Congress recognized the grave danger to the copyright system presented by the combination of sophisticated recording technology and the then-embryonic practice of rental of sound recordings. It moved quickly to give record companies the ability to protect their copyrights.

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Senator **DeConcini**. Thank you, Mr. Shirley.

Ms. James?

STATEMENT OF LUANNE JAMES

Ms. **James**. Good afternoon, Mr. Chairman. I am Luanne James, representing ADAPSO, the Computer Software and Services Industry Association.

I have just recently been named executive director of ADAPSO, but I have a long history in the software industry. For 12 years I was president of my own software company, Argonaut Information Systems, in Oakland, CA.

ADAPSO's more than 800 corporate members provide the public with a variety of computer software and services, including software for personal, mini, and mainframe computers.

ADAPSO applauds the introduction of S. 198, the Computer Software Rental Amendments Act of 1989. ADAPSO believes a compelling case can be made for passage of this legislation now.

Software is the brains of U.S. industry, which depends increasingly on efficient software. The U.S. software industry now comprises over 3,000 firms, generating $35 billion a year in revenues, and growing at over 20 percent a year. Seventy percent of software revenues come from familiar packaged software of the sort that would be covered by this legislation.

Of all copyright-protected industries, software is the hardest hit by infringement and piracy. Of all copyright-protected products, software is the quickest, cheapest, and easiest to copy. Since the works are digitally encoded, copies are perfect copies.

The practices of unauthorized software copying and commercial piracy have already been documented to this subcommittee. At the subcommittee's hearing on software rental last August, ADAPSO submitted a conservative estimate by Future Computing, Inc., of Dallas, that, in the Unites States alone, one illegal software copy is in use for every legal copy—a theft rate of 50 percent. The industry is estimated to have lost $800 million in 1985, which was the latest year for which estimates could be made. This conclusion is at the low end of estimates of illegal copying.

All knowledgeable parties believe the situation to be several times worse in foreign—especially developing—countries. The International Trade Commission concluded, in its study released last year, that the United States was losing $40 billion to $60 billion a year worldwide in sales of intellectual property-protected products and services through infringement and piracy.

In sum, the software industry occupies the unenviable position of facing far more prevalent infringement and piracy than any other copyright-related industry because duplication is so easy, cheap, and flawless.

The basic reproduction right alone does not suffice to protect software adequately as long as so-called rental offers a means of escape. Vendors must be able to exercise some control through the distribution chain to the customer to prevent widespread illegal copying.

There is no question that the U.S. Copyright Act provides the reproduction right for software copyright owners. The significance of many so-called rental practices is that they are a subterfuge for straight-out unlawful duplication.

The logic of the proposed amendment is the same as that of the record rental amendment just renewed last Congress for eight 8 more years. This issue is now gaining such significance that many international copyright experts are now talking about a distribution right to ensure the integrity of the core reproduction right through whatever marketing channels may be employed.

Mr. Chairman, ADAPSO submits that the software industry has reached the point where provision of the reproduction right only, with limited control over distribution channels, does not suffice.

Profitmaking businesses built on renting software are to be found across the country. One of the better known is the Software Emporium, founded in 1981 in Los Altos, CA, with six outlets in California and over 1,000 titles. Programs rent for $1 to $20 a day. Another is Black Sun of Emmaus, PA, with 3,000 Apple software titles. Ray's Almost New Computers and All Systems Go of San Antonio, which is owned by the Wood brothers, together stock almost 1,700 titles. One frequent customer was quoted as saying, "Since I found a place to rent software, my library has tripled. This is much more efficient than hunting up what is available on bulletin boards."

Other rental outfits cater to mail-order customers, such as Software That Fits of Humble, TX, also specializing in Apple software. For one-third of the retail price, one can obtain the software "on trial purchase" for 16 days. No one should be taken in by the wording. Although there may be some honest customers who will eventually purchase a program, the opportunity remains for any customer to keep the software permanently for the price of a blank disk or two. If such practices go unstopped, pirates will have had the last laugh and the software industry will continue to suffer losses.

Some may say, Mr. Chairman, that they need to try out software before spending hundreds of dollars on it, or that so-called rental or lending practices actually encourage legitimate sales. Many reputable retail outlets, however, do provide trained salespeople and make terminals available where customers can sit down and test a program out. Users are far from helpless because there are numerous product reviews and evaluations available, not to mention a burgeoning number of personal computer user groups.

As for the claim that rentals or lending actually spur sales, ADAPSO has seen no evidence of this. More fundamentally, this claim misses the point of guarding the integrity of the reproduction right, which is the heart of copyright. Suppose that there were some truth to the claim. Even so, it would not imply that there should be no rental right any more than the claim of increased sales from the playing of records by radio stations implies there should be no performance right. For copyright to have its rational significance and the desired effect on investment, meaningful rights must flow through the chain of commerce back to the original owner.

Continuing unchallenged piracy will cripple the research and development base of the software industry, with the unavoidable effect of slowed progress in the industry.

Fortunately, progress in our industry is so rapid that people can remember when there was no such thing as Windows or WordPerfect or dBase. Not so long ago, they were just gleams in the eyes of bright young programmers and venture capital investors. Our concern is that this is where tomorrow's great successes are today. Knowing the ease with which software copying can now be accomplished through rental, and supposing you were a venture capitalist, Mr. Chairman, would you be prepared to commit large sums to software development?

For all of the foregoing reasons, ADAPSO seeks software rental legislation. We see Senator Hatch's legislation as timely and urgent. This is the fourth Congress in which rental legislation has been introduced, and the problem simply has not gone away. Enough time has gone by that Congress must now decide whether it will tolerate such subterfuges of the reproduction right or whether it will outlaw them. Why be an out-and-out pirate when the law provides a convenient loophole?

In sum, Mr. Chairman, S. 198 will protect the software industry, and ADAPSO urges its speedy enactment.

This concludes my prepared statement. I would be pleased to respond to any questions.

[The prepared statement of Ms. James follows:]

STATEMENT OF LUANNE JAMES
EXECUTIVE DIRECTOR
ADAPSO
THE COMPUTER SOFTWARE AND SERVICES INDUSTRY ASSOCIATION, INC.
ON S.198
THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1989
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON PATENTS, COPYRIGHTS, AND TRADEMARKS
APRIL 19, 1989

Testimony of ADAPSO

Good afternoon, Mr. Chairman. I am Luanne James, representing ADAPSO, the Computer Software and Services Industry Association. Although I have just been named as ADAPSO's Executive Director, I spent 12 years as president of my own software company, Argonaut Information Systems in Oakland, CA. ADAPSO's more than 800 corporate members provide the public with a variety of computer software and services: software for personal, mini, and mainframe computers, professional software services, network-based information services, and information systems integration.

ADAPSO applauds the introduction of S.198, the Computer Software Rental Amendments Act of 1989. This bill would remove software from the scope of the first sale doctrine, under which vendors can exercise no further control over resale or rental of individual copies once they have been sold. ADAPSO believes a compelling case can be made for passage of this legislation now.

1) Software is the brains of U.S. industry, which depends increasingly on efficient software.

Software provides the intellectual power for computers and is thus the driving force of U.S. industry and business. The U.S. software industry now comprises over 3000 firms, generating over $35 billion a year in revenues, and growing at over 20% a year. Notably, 70% of software revenues come from familiar packaged software of the sort that would be covered by this legislation, rather than custom programming for one or more customers. Every year, the Commerce Department chronicles the continuing explosive growth of the software industry in its **Industrial Outlook**, putting software at or near the top of its growth industries list.

2) Of all copyright-protected industries, software is the hardest hit by infringement and piracy.

Of all copyright-protected products, software is the quickest, cheapest, and easiest to copy. Since the works are digitally encoded, copies are perfect copies. The practices of unauthorized software copying and commercial piracy have already been documented to the Subcommittee. At the Subcommittee's hearing on software rental last August, ADAPSO submitted a conservative estimate by Future Computing, Inc., of Dallas that, in the U.S. alone, one illegal software copy is in use for every legal copy, a theft rate of 50%. The industry is estimated to have lost $800 million in 1985, the latest year for which estimates could be made. This conclusion is at the low end of estimates of illegal copying.

All knowledgeable parties believe the situation to be several times worse in foreign, especially developing, countries. The International Trade Commission concluded, in its study released last year, that the U.S. was losing $40-60 billion a year worldwide in sales of intellectual property-protected products and services through infringement and piracy. In sum, the software industry occupies the unenviable position of facing far more prevalent infringement and piracy than any other copyright-related industry, because duplication is so easy, cheap, and flawless.

3) The basic reproduction right alone does not suffice to protect software adequately as long as so-called rental offers a means of escape. Vendors must be able to exercise some control through the distribution chain to the customer to prevent widespread illegal copying.

There is no question that the U.S. Copyright Act provides the reproduction right for software copyright owners. The significance of many so-called rental practices is that they are a subterfuge for straight-out unlawful duplication. The logic of the proposed amendment is the same as that of the Record Rental Amendment, just renewed last Congress for eight more years. Indeed, this issue is now gaining such significance that many international copyright experts are now talking about a "distribution right", to ensure the integrity of the core reproduction right throughout whatever marketing channels may be employed.

Mr. Chairman, ADAPSO submits that the software industry has reached the point where provision of the reproduction right only, with limited control over distribution channels, does not suffice. Profit-making businesses built on "renting" software are to be found across the country. One of the better-known is The Software Emporium, founded in 1981 in Los Altos, CA, with six outlets in California and over 1,000 titles. Programs "rent" for $1-$20 a day.[1] Another is Black Sun of Emmaus, PA, with 3,000 Apple software titles.[2] Ray's Almost New Computers and All Systems Go of San Antonio, owned by the Wood brothers, together stock almost 1,700 titles. One frequent customer was quoted as saying, "Since I found a place to rent software, my library has tripled....This is much more efficient than hunting up what is available on bulletin boards."[3]

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1. Kathleen Melymuka, "Software Rental Saves Unnecessary Purchases, Alternative to Buying", **PC Week**, September 1, 1987; Carolyn Leal, "'Try It Before You Buy It' changes Software Marketing," **The Business Journal** (San Jose), February 10, 1986, p. 35.

2. Robert J. Wascura, "$30 Ripoff Prompts the Start of a Computer Software Business," **Lehigh Valley Business Digest**, September, 1987, p. 10.

3. Judi Critton, "Loopholes Open the Door for Software Rentals," San Antonio **Business Journal**, February 22, 1988, p. 12

Other "rental" outfits cater to mail-order customers, such as Software That Fits (formerly MacRentals) of Humble, TX, also specializing in Apple software. For one third of the retail price, one can obtain the software "on trial purchase" for 16 days.[4] No one should taken in by the wording. **Although there may be some honest customers who will eventually purchase a program, the opportunity remains for any customer to keep the software permanently for the price of a blank disk or two.** If such practices go unstopped, pirates will have had the last laugh, and the software industry will continue to lose suffer losses.

Some may say, Mr. Chairman, that they need to "try out" software before spending hundreds of dollars on it, or that so-called rental or lending practices actually encourage legitimate sales. Many reputable retail outlets, however, provide trained salespeople and make terminals available where customers can sit down and test a program out. Users are far from helpless, as numerous product reviews and evaluations are available, not to mention a burgeoning number of personal computer user groups.

As for the claim that rentals or lending actually spur sales, ADAPSO has seen no evidence of this. More fundamentally, this claim misses the point of guarding the integrity of the reproduction right, which is the heart of copyright. Suppose that there were some truth to the claim. Even so, it would not imply that there should be no rental right -- any more than the claim of increased sales from the playing of records by radio stations implies that there should be no performance right. For copyright to have its rational significance and desired effect on investment, meaningful rights must flow through the chain of commerce back to the original owner.

4) Continuing unchallenged piracy will cripple the research and development base of the software industry, with the unavoidable effect of slowed progress in the industry.

The national significance of software piracy is self-evident. Fortunately, progress in our industry is so rapid that people can remember when there was no such thing as Wordperfect or dBase. Not so long ago, they were just gleams in the eyes of bright young programmers and venture capital investors. Our concern is that this is where tomorrow's great successes are today. Knowing the ease with which software theft can now be accomplished through "rental", Mr. Chairman, and supposing you were a venture capitalist, would you be prepared to commit large sums to software development?

5) The U.S. has the most to gain or lose by adequate and effective software protection. Therefore, it should continue to lead the way internationally.

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4. Michael Alexander, "Software Rental Furor; Test Drive or License to Pirate? Publishers, Sellers Disagree," **Computerworld**, October 3, 1988, p. 14.

As you know, Mr. Chairman, the European Community (EC) is driving toward a unified internal market by the end of 1992. That unification is being achieved largely through a series of almost 300 directives issued to, and binding upon, the 12 member states. A recent draft directive on software calls unamgibuously for copyright protection for software as a literary work, ratifying the growing international consensus on this point. Notably, the EC Commission has concluded that a distribution right must be included as an integral part of software protection:

> Distribution of a computer program by means of sale or license is normally controlled by the author of the program, either directly if he is also the producer of the marketed product, or indirectly by assignment of his right to a publisher or producer of programs. The author's right is normally exhausted once the product has been put on the market with his consent. **This Directive proposes that as regards the rental, leasing and licensing of software, the distribution right should not be exhausted by the first sale, leasing or licensing of the program**....It is possible at present to rent a copy of a software package at a nominal charge, to copy it at home using relatively inexpensive material and to return it the following day. It is clear that, given the complexity of most programs and...that they are used for a given purpose rather than read for enjoyment, cheap, short-term rental allows the home copier to save on the cost of purchase or leasing programs: as such, rental is highly prejudicial to right holders' interests and should be subject to the right to prohibition....[5]

It would be hard for the U.S. software industry to swallow the irony that, although it leads it world in the marketplace, it would be the EC, rather than our own country, which provided the most reliable protection.

6) For all of the foregoing reasons, ADAPSO seeks software rental legislation.

We see Senator Hatch's legislation as timely, indeed, urgent. This is the fourth Congress in which rental legislation has been introduced, and the problem simply has not gone away. Enough time has gone by that Congress must now decide whether it will tolerate such subterfuges of the reproduction right, or whether it will outlaw them. Why be an out-and-out pirate when the law provides a convenient loophole?

* * * * * *

In sum, Mr. Chairman, S.198 will protect the software industry, and ADAPSO urges its speedy enactment. This concludes my prepared statement, and I would be pleased to respond to any questions that you have.

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[5] Com(88) 816 final - SYN, Brussels, 17 March 1989, Proposal for a Council Directive on the Legal Protection of Computer Programs, Part Two, 4.1.c; emphasis supplied.

ADAPSO
the computer software and services industry association

Summary of ADAPSO Testimony

Senate Judiciary Committee
Subcommittee on Patents, Copyrights, and Trademarks
April 19, 1988

ADAPSO, the Computer Software and Services Industry Association. supports passage of software rental legislation and applauds the introduction of S.198, the Computer Software Rental Amendments Act of 1989.

Of all copyright-protected industries, software is the hardest hit by infringement and piracy. Of all copyright-protected works, software is the quickest, cheapest and easiest to copy, and copies are perfect copies. Conservatively, for every legal copy in use there is an illegal copy; losses amounted to $800 million in 1985.

The basic reproduction right alone does not suffice to protect software adequately as long as so-called rental offers a means of escape. Vendors must be able to exercise some control through the distribution chain to the customer to prevent widespread illegal copying.

Continuing unchallenged piracy will cripple the research and development base of the software industry, with the unavoidable effect of slowed progress in the industry.

The U.S. has the most to gain or lose by adequate and effective software protection. It would be highly ironic for the U.S. to yield the lead in software protection to the European Community, which has already proposed a rental right for software.

For further information contact Ronald J. Palenski, General Counsel, at the ADAPSO office.

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Senator DECONCINI. Thank you, Ms. James.

I have one question, although I will submit some that I would like you to answer for the record.

Senator DECONCINI. You talk about the necessity of America to remain globally competitive. Do any of you know what protection other countries have similar to S. 198, if any? Ms. James, would you care to address that?

Ms. JAMES. I do know the European Community, the EC, which is driving toward a unified internal market, has a draft directive pending which calls for copyright protection for software as a literary work, which is ratifying a growing international consensus on that point.

The EC Commission has concluded that a distribution right must be included as an integral part of software protection.

Senator DECONCINI. Mr. Shirley or Ms. Roizen, do you care to respond?

Mr. SHIRLEY. I believe that Great Britain has also passed a bill giving copyright owners the right to authorize the rental of software products last year.

Senator DECONCINI. Ms. Roizen, do you care to offer any comments?

Ms. ROIZEN. I would just add that I believe we've seen that many of the other countries with whom we do business are looking to us to provide for them a model that they can then use, as well.

Senator DECONCINI. Senator Hatch?

Senator HATCH. Ms. Roizen, the last time you testified before our committee you mentioned that the industry estimates that there is an illegal copy of a computer program for each copy legitimately sold. You said that today, Ms. James. Is that still true?

Ms. ROIZEN. I believe so. Yes.

Senator HATCH. Do you still both agree on that?

Ms. JAMES. Yes.

Senator HATCH. What do you use as a basis for that estimate?

Ms. JAMES. There was a study that was done by a research organization in Dallas, TX, called Future Computing, Inc., and this study was done a couple of years ago. Their market survey came to that conclusion, and in the report they said they thought that was a conservative estimate.

Senator HATCH. Do you folks believe that S. 198 is a foot in the door for the erosion of the first sale doctrine? Do you see any way that that's so?

Ms. ROIZEN. No.

Mr. SHIRLEY. I don't believe so, Senator, because this bill is limited only to software rental and not to a broad undermining of the first sale doctrine. I think in that sense it is very conservative.

Senator HATCH. That's my contention, too.

Mr. Shirley, the Record Rental Amendment of 1984 exempted nonprofit libraries and nonprofit educational organization, and although S. 198, as introduced, contains no such exemption, it is my understanding that the representatives of your industry have agreed to accept an amendment which would exempt nonprofit libraries from the bill. I want to establish for the record if you have agreed to such an amendment. And, if so, why did you agree to the exception only for libraries and not for nonprofit educational institutions?

Mr. SHIRLEY. Senator, the answer to the first part of the question is: yes, we have agreed to an exemption for libraries. We have met with representatives of libraries.

We would oppose a broader exemption for nonprofit organizations generally, however. First, to our knowledge no other nonprofit organization has applied, other than libraries, for an exemption.

Second, specific to the largest other group of nonprofit organizations, which would be educational institutions, they currently constitute a major market for software products.

By contrast, they are a very small market for sound recordings. Many software programs are created specifically for use by educational institutions, and frequently educational institutions, themselves, are copyright owners. We are concerned that lending or renting of software could be used to circumvent copyright law in the educational market.

Finally, most software companies, including ourselves, provide very deep discounts—and often specialized software—for the educational institutions and for other nonprofit organizations. We believe that these special programs will fully meet the needs of the educational community.

Senator HATCH. Mr. Shirley, you state that the only purpose in renting software would be to make a copy. What about previewing software? Wouldn't that be a reason to rent, as well?

Mr. SHIRLEY. No. We don't believe so. We provide copies of our software either at a very low cost or no cost to retailers and to potential purchasers of software. We recognize the need to review a product of this price. We welcome the opportunity for customers to try out our products in a setting which will not give rise to wholesale copying of the programs.

Actually, under current circumstances there are ample opportunities to preview software without renting it.

Senator HATCH. Ms. James, you noted in your written statement that you dispute the claim that software rental may actually spur software purchases. The claim has also been made that if this bill becomes law that it may actually encourage higher prices for software packages. Now, is that a potential problem?

Ms. JAMES. No. I don't think so. I believe that the industry is competitive enough that the pricing of the industry is going to be driven by the competition between the companies and not by the fact that some people are going to be paying a higher price because they are going to buy it instead of copying it when they rent it.

Senator HATCH. Has ADAPSO taken any particular position on the two amendments that have been proposed on behalf of the nonprofit libraries and the video stores that are renting computer game cartridges?

Ms. JAMES. No. We haven't taken an official position. To be honest, we have just recently learned about the amendment, and we haven't had a chance to talk to our membership or poll our membership as to their opinion on them.

We are, of course, sympathetic to the library with good intentions. We do have some misgivings about the intentions of the people who would be renting the software from the libraries, but we would check with our membership to see whether they have concerns about it before taking a position on it.

Senator **Hatch**. We'd like to have that for the record, if possible.

Ms. **James**. Yes, sir.

Senator **Hatch**. Thank you, Mr. Chairman.

Senator **DeConcini**. The Senator from Iowa?

Senator **Grassley**. Yes. On the last point, in the contact I have had with the Iowa video dealers on this issue of copying video games, they maintain that they are virtually noncopyable. I want to know whether you feel the same way.

Mr. **Shirley**. Yes, we do agree. That's why we've agreed with them to——

Senator **Grassley**. Oh, you have agreed to that amendment? I understood you to say that you had not.

Mr. **Shirley**. No, that's ADAPSO.

Ms. **James**. That's ADAPSO. We have not had a chance to discuss it with our membership.

Senator **Grassley**. And in regard to the very first question on the economic impact to you, can you assess the dollar amount? You said the percentage you thought were copied, but you didn't say what the dollar amount was. Does that assume that for every copy that is made you would have made a sale for that copy?

Ms. **Roizen**. Clearly, some of the copying that goes on would not result in a sale otherwise, but we believe that much of it that goes on would result in sales. I believe that the economic impact would potentially even serve to lower the cost of software because if we have more legitimate customers over whom to defray the cost of our development, then conceivably the prices could go down.

One of the reasons software is expensive is because we have a smaller base of potential customers than, for example, the record industry or some of the other things for which there is a broader consumer base.

Senator **Grassley**. My question is whether there will be a bad effect without the passage.

Ms. **Roizen**. Well, hopefully, if we have more customers to sell to because they are not making illegal copies, I believe it would be very beneficial to our industry.

Senator **Grassley**. So the study that was referred to, did it analyze the financial impact in the absence of this legislation? Do you know what the financial impact on your businesses has been?

Ms. **Roizen**. I can speak on behalf of our small company, and I believe that the financial impact is great to perhaps—I would not say 100 percent of those consumers, but I would say one-third to one-half of them would be legitimate customers of ours if they did not have an easy method of copying illegally.

Senator **Grassley**. I guess, then, the conclusion I draw is that the study you referred to has not actually quantified the financial impact on the business because of copying?

Mr. **Shirley**. The Future Computing study implied that half of the software in use was copied, not purchased. So you could extend that to say that the economic cost to all of us was somewhere in the nature of 50 percent of the business potential that we could have done. They did not specifically attempt to put a dollar value on that study.

Senator **Hatch**. That's billions of dollars then?

Mr. **Shirley**. Sir?

Senator **Hatch**. That would be billions of dollars.

Mr. **Shirley**. Yes, sir, it would be.

Senator **Grassley**. When we considered and passed and, in fact, reauthorized again legislation on record rental, we did what we call "sunset," which I think you all know means that it comes automatically to an end. What would be your view of a like approach on this issue? It forces review. Do you have any opinion on that provision for sunset? I suppose what you're thinking is that you'd rather not have it, but if you have to have it to get the bill passed you'll take it; is that right?

Mr. **Shirley**. I think we would agree if we have to come back here again in 4 years that we would be back here again in 4 years.

Senator **Grassley**. You'd rather not have it, but you don't find it anything in total opposition to the thought?

Mr. **Shirley**. No, Senator, I don't. I think that the major reason is that we think there is a very timeliness to having this bill enacted as soon as possible because we fear that this industry will get started and grow in a major way if something doesn't happen very soon. So if that was a major issue, yes, we'd certainly be willing to——

Senator **Grassley**. Can you explain to me why, with the sophistication of technology in the computer software area, why is it that the developers have not been able to make the programs noncopyable?

Ms. **Roizen**. Over time those copy protection schemes have actually proven to be detrimental to the use of the software. First of all, we, as publishers, encourage our legitimate users to make backup copies and to allow them to place copies of our software on their hard disks so they can more easily use them. Many of us have removed copy protection schemes because it has been an ultimate disservice to the consumer in the use of the software.

Senator **Grassley**. So technically it is capable, but you just can't do it for the good of your business?

Ms. **Roizen**. Right.

Senator **Grassley**. Thank you.

Senator **DeConcini**. Thank you very much.

I want to recognize Bruce Lehman, who is also with us today as counsel and representing the Software Publisher's Association. We're glad to have you here. Do you have any statement or anything you'd like to say?

Mr. **Lehman**. Thank you, Senator. I'm just here to answer any questions if the panel cannot, to your satisfaction.

Senator **DeConcini**. They managed without you today. [Laughter.]

Well, we just gave them the easy ones. We'll save the hard ones to submit to you.

Thank you very much, ladies and gentlemen.

We will now go to the next panel: Mr. David Laird, chairman, Copyright Subcommittee, American Library Association, and director, University of Arizona Library; and Mr. Bruce M. Kennedy, chair of the Copyright Committee, American Association of Law Libraries.

Gentlemen, your full statements will appear in the record, and we would ask you to summarize them for us. We'll start with Mr. Laird, please.

Welcome, Mr. Laird, from sunny Arizona to gloomy Washington. Well, it's trying.

Mr. LAIRD. It's nice today. A little rainy yesterday, though.

PANEL CONSISTING OF DAVID LAIRD, CHAIRMAN, COPYRIGHT SUBCOMMITTEE, AMERICAN LIBRARY ASSOCIATION, AND DIRECTOR, UNIVERSITY OF ARIZONA LIBRARY, TUCSON, AZ; AND BRUCE M. KENNEDY, CHAIR OF THE COPYRIGHT COMMITTEE, AMERICAN ASSOCIATION OF LAW LIBRARIES, WASHINGTON, DC

STATEMENT OF DAVID LAIRD

Mr. LAIRD. Chairman DeConcini and Senator Hatch, I am the university librarian at the University of Arizona in Tucson, but I am here as chairman of the American Library Association Subcommittee on Copyright.

ALA is the oldest and largest organization of libraries and librarians in the world. Its membership represents thousands of school, public, academic, and other not-for-profit libraries which have served for generations as storehouses and preservers of copyrighted materials.

But the goal of libraries is not mere preservation. The Library Bill of Rights states that "The American Library Association affirms that all libraries are forums for information and ideas." And, further, "Libraries should challenge censorship in fulfillment of their responsibility to provide information and enlightenment." That same Library Bill of Rights is explicit about access. It says, "Restricting access to certain titles and classes of library materials for protection and/or controlled use is a form of censorship."

As written, S. 198 deliberately denies an exemption to libraries which loan software to patrons, even when they do so without purpose of direct or indirect commercial advantage. We understand this denial was motivated primarily by the costs of software development and the ease of copying software which proprietors, for a variety of reasons, choose not to protect themselves.

It is the position of ALA that in fulfilling their role as forums for information libraries provide equal access to all members of our society; and by exposing the public to information in all its forms, libraries have contributed significantly to the market for copyrighted materials.

We therefore urge that S. 198 be amended as proposed by the Software Publishers Association to recognize an exception for not-for-profit libraries which circulate software. With this inclusion, ALA can support S. 198.

The aim of S. 198, in its original form, is to reduce illegal copying by prohibiting the renting of software for commercial gain. It is the American Library Association's position that significant harm from lending of software by not-for-profit libraries cannot be demonstrated.

The purpose of libraries in lending software for home or in-house use are: one, to help educate the public in the use of computers and computerized information; and, two, to provide access to computerized information on as wide a basis as possible.

The availability of software in libraries allows patrons to preview products prior to making a purchasing decision, but few libraries can afford hardware in sufficient quantity and variety to meet patron demands. Lending for home use, therefore, provides three important services: it allows some patrons access to important material in a timely manner; it allows users to review material at their own pace; and it permits evaluation of software in the environment and with the hardware on which that software will be used when purchased.

Public libraries have taken the lead in providing software access to the public, but other libraries—not-for-profit ones—have taken steps in that direction. In examples known to the American Library Association, not-for-profit agency libraries circulate software for use with handicapped individuals—usually children. Parents take advantage of this borrowing privilege to evaluate the usefulness of educational programs as they relate to the individual needs of their child.

Because of the newness of software, many libraries already go to great lengths to make sure patrons are aware of the restrictions or prohibitions on software copying. The Liverpool Public Library in New York, for example, labels each piece of circulating software with a large notice stating that copying is a crime. In addition, borrowers are required to read a set of rules—including a warning that software piracy is a crime—and to sign a written statement agreeing that they understand the rules and will abide by them. No such efforts are made with respect to other copyrighted materials in the library. Amendment of S. 198 to require some form of notice would be acceptable to the American Library Association.

We believe that if libraries are not given an exemption in this legislation, they will be forced to negotiate with each publisher for the right to lend that publisher's materials—almost certainly at an increased cost. In some cases, no agreement will be possible and a form of censorship will occur.

At any rate, the cost of negotiating such rates between potentially thousands of libraries and thousands of producers about thousands of new products each year will be extremely high. Libraries, faced with the additional cost of the products and the additional cost in time to make them available, will have essentially two options: one, to pass along to the users those costs; or, two, to choose not to make the software available. Poorer libraries will, of necessity, have to do more of both, and both are overt forms of economic censorship.

In light of the social and economic costs and the loss of access by the public to electronic information, Congress should include in S. 198 the recommended exemption for not-for-profit libraries. Granting such an exemption at this time would not preclude review of the issue in 3 to 5 years, when more experience with library lending of software will place everyone in a better position to evaluate the benefits and consequences of the practice.

In summary, the American Library Association supports the exemption from S. 198 of not-for-profit libraries. It also accepts the proposal that a specific warning notice be required when libraries lend copyrighted software. And it accepts the concept that a review of this legislation should occur in 3 to 5 years.

Thank you.

[The prepared statement of Mr. Laird follows:]

Statement of

W. David Laird, Director
University of Arizona Library

before the
Subcommittee on Patents, Copyrights, and Trademarks
Senate Judiciary Committee

on
The Computer Software Rental Amendments Act of 1989
(S. 198)

April 19, 1989

I am testifying today on behalf of the American Library Association as Chairperson of the Association's Ad Hoc Copyright Subcommittee. The ALA is the oldest and largest organization of libraries and librarians in the world. Its membership of 48,000 librarians, trustees, and friends of libraries represents thousands of school, public, academic, and other not-for-profit libraries which have served for generations as storehouses and preservers of copyrighted materials. However, the goal of libraries is not mere preservation; the "Library Bill of Rights" states: "The American Library Association affirms that all libraries are forums for information and ideas..." and further, "Libraries should challenge censorship in fulfillment of their responsibility to provide information and enlightenment." That same "Library Bill of Rights" is explicit about access. It says, "Restricting access to certain titles and classes of library materials for protection and/or controlled use is a form of censorship."

As written, S. 198 deliberately denies an exemption to libraries which lend software to patrons even when they do so without purpose of direct or indirect commercial advantage. We understand this denial was motivated primarily by the costs of software development and the ease of copying software which proprietors, themselves, choose not to protect for a variety of reasons. The position of ALA is that libraries, in fulfilling their role as forums for information, provide equal access to all members of our society; and by exposing the public to information in all its forms, libraries have contributed significantly to the market for copyrighted materials. Therefore, we urge that S. 198 be amended, as proposed by the Software Publishers Association, to establish an exemption for not-for-profit libraries which circulate software. With this inclusion, the ALA can support S. 198.

The aim of S. 198, in its original form, is to reduce the amount of illegal copying by prohibiting software rental for commercial gain. ALA's position is that significant harm from lending of software by not-for-profit libraries cannot be demonstrated. There is, we suggest, no demonstrable, widespread copying of computer programs by library patrons. In support of our position, we assert: (1) software collections are in their infancy, (2) libraries which do lend software for home or in-house use have taken extraordinary precautions to educate users, and (3) libraries generally introduce software to neophytes, not to sophisticated users who are skilled in accessing protected software by electronic means or by "unlocking" protective devices built into the software.

The purposes of libraries in lending software for home or in-house use are 1) to help educate the public in the use of computers and computerized information, and 2) to provide access to computerized information on as wide a basis as possible. The availability of software in libraries allows patrons to preview products prior to making a purchasing decision, but few libraries can afford hardware in quantity and variety sufficient to meet patron demands. Therefore, lending for home use provides three important services: (1) it allows some patrons access to important material in a timely manner, (2) it allows users to review material at their own pace, and (3) it permits evaluation of the software in the environment and with the hardware on which it will be used after purchase.

Although most libraries are only beginning to lend software, a few innovators have been providing such service for several years. In one case known to us, the Liverpool Public Library in New York has been circulating software for about five years. It currently has a collection of approximately 650 pieces of software. Last year, Liverpool made approximately 13,500 loans from its software collection. As most libraries do with any expensive item, Liverpool does not lend software with a replacement cost of $200 or more. Such items must be used in-house. The Liverpool collection is mostly "educational" and Library Director Jean Armour Polly estimates that the in-house use alone amounted to 12,000 hours, about 65 percent of which was by adults.

Public libraries have taken the lead in providing software access to the public, but other libraries also have taken steps in that direction. Some university and community college libraries make software available to faculty, staff, and students. In at least one recent instance, producers of software have distributed to universities free copies of a software product for use by the university library without restriction; and in yet other instances, software has been provided on a reduced-cost basis to encourage use by students, many of whom already have the resources to purchase software, and all of whom are potential, future consumers. Further, in other examples known to ALA, not-for-profit agency libraries circulate software for use with handicapped individuals, usually children. Parents take advantage of this borrowing privilege to evaluate the usefulness of educational programs as they relate to the individual needs of their child.

Because of the "newness" of software, many libraries already go to great lengths to make sure patrons are aware of restrictions or prohibitions on software copying. The Liverpool Public Library, for example, labels each piece of circulating software with a large notice stating that copying is a crime. In addition, borrowers are required to read a set of rules--including a warning that software piracy is a crime--and to sign a written statement agreeing that they understand the rules and will abide by them. No such extraordinary efforts are made with respect to other copyrighted materials in the library. Amendment of S. 198 to require some form of notice would be acceptable to ALA.

We believe that if libraries are not given an exemption in this legislation, they will be forced to negotiate with each publisher for the right to lend that publisher's materials, almost certainly at an increased cost. In some cases, no agreement will be possible and a form of censorship will occur. In addition, the cost of negotiating such rates between potentially thousands of libraries and thousands of producers about thousands of new products each year would be extremely high. Libraries faced with the additional costs of the products and the additional costs in time to make them available will have essentially two options: (1) to pass along to users a share of those costs, or (2) to choose NOT to make the software available. Poorer libraries will of necessity have to do more of both, and both are overt forms of economic censorship.

In light of the social and economic costs, and the loss of access by the public to electronic information, Congress should include in S. 198 the recommended exemption for not-for-profit libraries. Granting such an exemption at this time would not preclude review of the issue in three to five years, when more experience with library lending of software will place everyone in a better position to evaluate the benefits and consequences of the practice.

In summary, the American Library Association:

1) supports the exemption from S. 198 of not-for-profit libraries, as proposed by the Software Publishers Association;

2) accepts the proposal that a specific warning notice be required when libraries lend copyrighted software; and

3) accepts the concept that a review of this legislation should occur in three to five years.

Statement of

W. David Laird, Director
University of Arizona Library

before the
Subcommittee on Patents, Copyrights, and Trademarks
Senate Judiciary Committee

on
The Computer Software Rental Amendments Act of 1989
(S. 198)

April 19, 1989

SUMMARY

In summary, the American Library Association:

1) supports the exemption from S. 198 of not-for-profit libraries, as proposed by the Software Publishers Association;

2) accepts the proposal that a specific warning notice be required when libraries lend copyrighted software; and

3) accepts the concept that a review of this legislation should occur in three to five years.

Senator DECONCINI. Thank you, Mr. Laird.

Mr. Kennedy?

STATEMENT OF BRUCE M. KENNEDY

Mr. KENNEDY. Good afternoon Mr. Chairman and members of the subcommittee. I am here today on behalf of the American Association of Law Libraries—AALL.

AALL is an organization formed to promote law librarianship and to develop and improve law libraries. The membership of AALL includes law libraries and law librarians in government agencies and courts, law firms, and the Nation's law schools. AALL is interested in S. 198 because its members, particularly those in the academic sector, collect computer software programs and lend them to library patrons.

AALL must oppose S. 198 in its current form. However, we would support the bill if it is amended to add an exemption for nonprofit libraries. This exemption should provide that the prohibition against lending or leasing computer programs does not apply to nonprofit libraries. It is our understanding that such an amendment is now under consideration. So amended, AALL would support S. 198 because of the unusual vulnerability of software to piracy.

The present version of S. 198 has three flaws. First, the bill will restrain libraries from the legitimate lending of educational, recreational, and utility computer software to library users. Not only is lending the core of library service, it is an innocent activity.

No causal connection has been shown between library lending and software piracy. In its current form, S. 198 broadly restricts innocent libraries for the possibility of thwarting a few guilty library users.

Second, S. 198 will limit the library user's access to software programs which is now permitted under the copyright law. Certain kinds of software—particularly educational software—are not likely to be pirated. Even the more vulnerable utility programs such as WordPerfect or Lotus 1-2-3 do see bona fide fair use in a library setting.

Consider these examples. An executive, who is visiting from another city, may want to borrow Lotus 1-2-3 for a few hours to update a spreadsheet. A scholar who owns WordPerfect version 4.2 may want to test run version 5.0 before deciding to buy the upgrade. A fledgling database manager may want to see exactly how much effort it will take to learn dBase IV before deciding if it is worth that effort.

All of these people could legitimately borrow a computer program from a library and use it without infringing the copyright laws. In its present form, S. 198 endangers this fair use.

Third, S.198 is overbroad. It may unintentionally limit access to more than just computer programs. Libraries now collect mixed media information products that have software components. Books are published with software appendices. Interactive video programs and compact disc data products are driven by software that serves as the brain of an entire intellectual work. If S. 198 forbids a library to lend the software component of a mixed media work, the remainder of the work is also functionally noncirculating.

Even with an exemption, AALL's willingness to support S. 198 is premised on the special vulnerability of computer programs to illegal copying. With some justice, the creators of computer programs state a case that theirs is the only type of copyrighted work that can be easily, quickly, totally, and perfectly copied by an infringer. Given this vulnerability, AALL views an amended S. 198 as a regrettable, but justifiable, limitation on the first sale doctrine.

AALL would, however, vigorously oppose abandoning the first sale doctrine for other kinds of copyrighted works that are less easily pirated. Further erosion of the first sale doctrine would constrict the circulation of library materials and could gravely damage the American library system. It would also devalue the immense investments made by State and Federal taxpayers to build rich public library collections.

Nevertheless, in light of the special vulnerability of computer programs to infringement, AALL is prepared to support S. 198 if it is amended to include an exemption for nonprofit libraries.

Finally, on behalf of AALL, I want to express our thanks to the members of this subcommittee for hearing our views today.

Thank you very much. I will be happy to answer any of your questions.

[The prepared statement of Mr. Kennedy follows:]

STATEMENT ON BEHALF OF
THE AMERICAN ASSOCIATION OF LAW LIBRARIES

by

BRUCE M. KENNEDY

Chair of the Copyright Committee
of the American Association of Law Libraries

before the

SUBCOMMITTEE ON PATENTS, COPYRIGHTS & TRADEMARKS of the
SENATE COMMITTEE ON THE JUDICIARY

on

S 198; THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1989

Wednesday, April 19, 1989.

Good afternoon. I am here today on behalf of the American Association of Law Libraries (AALL).

AALL is an organization with approximately 4,000 members nationwide. It was formed to promote law librarianship and to develop and improve law libraries. The membership of AALL includes law libraries and law librarians in government agencies and courts, law firms and the nation's law schools. AALL is interested in S 198 because its members, particularly those in the academic sector, collect computer software programs and lend them to library patrons.

AALL must oppose S 198 in its current form. However we would support the bill if it is amended to add an exemption for non-profit libraries. This exemption should provide that the prohibition against lending or leasing computer programs does not apply to non-profit libraries. It is our understanding that such an amendment is now under consideration. So amended, AALL would support S 198 because of the unusual vulnerability of software to piracy.

The present version of S 198 has three flaws.

First, the bill will restrain libraries from the legitimate lending of educational, recreational, and utility computer software to library users. Not only is lending the core of library service, it is an innocent activity. No causal connection has been shown between library lending and software piracy. In its current form, S 198 broadly restricts innocent libraries for the possibility of thwarting a few guilty library users.

Second, S 198 will limit the library user's access to software programs which is now permitted under the copyright law. Certain kinds of software - particularly educational software- are not likely to be pirated. Even the more vunerable utility programs - such as Word Perfect or Lotus 123 - see bona-fide "fair use" in a library setting. Consider these examples. An executive, who is visiting another city, may want to borrow Lotus 123 for a few hours to update a spreadsheet. A scholar, who owns Word Perfect version 4.2, may want to test run version 5.0 before deciding to buy the upgrade. A fledgling database manager may want to see how much effort it will take to learn DBase IV before deciding if it worth that effort. All of these people could legitimately borrow a computer program from a library and use it without infringing the copyright laws. In its present form, S 198 endangers this fair use.

Third, S 198 is overbroad; it may unintentionally limit access to more than just computer programs. Libraries now collect mixed media information products that have software components. Books are published with software appendices. Interactive video programs and compact disc data products are driven by software that serves as the "brain" of an entire intellectual work. If S

198 forbids a library to lend the software component of a mixed media work, the remainder of the work is also functionally non-circulating.

Arguably, non-profit libraries are insulated from S 198 since the bill applies to lending software for direct or indirect commercial advantage. However, this is inadequate protection since it offers only a litigation defense. A library may be forced to defend itself through the pleading and discovery stages of a lawsuit before a court can determine that a library's lending practices are not for any commercial advantage. The sensible solution to this concern is to exempt libraries from the strictures of S 198. This approach was used in the 1984 copyright legislation that forbids the leasing, lending or renting of phonorecords.

Even with an exemption, AALL's willingness to support S 198 is premised on the special vulnerability of computer programs to illegal copying. With some justice, the creators of computer programs state a case that theirs is the only type of copyrighted work that can be easily, quickly, totally and perfectly copied by an infringer. Given this vulnerablity, AALL views an amended S 198 as a regretable but justifiable limitation on the First Sale Doctrine.

AALL would, however, vigorously oppose abandoning the Doctrine for other kinds of copyrighted works that are less easily pirated. Further erosion of the First Sale Doctrine would constrict the circulation of library materials and could gravely damage the American library system. It would also devalue the investments made by state and federal taxpayers to build rich library collections.

Nevertheless, in light of the special vulnerability of computer programs to infringement, AALL is prepared to support S 198 if it is amended to include an exemption for non-profit libraries.

Finally, on behalf of AALL, I want to express our thanks to the members of the Subcommittee for hearing our views.

Thank you. Now I will be happy to answer any questions that you may have.

Senator DeConcini. Thank you, Mr. Kennedy.

Did I hear you say that AALL would accept the proposal to post warning notices on copyright software.

Mr. Kennedy. I didn't say that, but we would.

Senator DeConcini. You have no objection to that?

Mr. Kennedy. We have no objection.

Senator DeConcini. I thought that would be the case.

Mr. Laird, is there any way for libraries to tell whether computer software that you have checked out has been copied?

Mr. Laird. Not that I am aware of. I think the act of reading the software to use it could be monitored conceivably, but I don't see how you could tell if it had been copied.

Senator DeConcini. I have no problem with the concept of exempting libraries. I just wonder if we are not inviting an abuse. What happens with records? Do you get a lot of use for the popular records, and do you have any idea whether they are being copied?

Mr. Laird. In that sense I can only speak for academic libraries, or at least from the academic perspective. We don't believe that there is much of that kind of copying that goes on with records. Again, it has been a long time since we have worried much about it. It seems that the industry hasn't suffered. If anything, perhaps it has benefited from the fact that people could listen to something before they bought it rather than having to take the chance of buying it off the shelf.

In any case, it seems that the software industry is so new and there is so little data that to not exempt libraries as to presume of guilt that is in no way proved.

Senator DeConcini. I think that's a good point. It just troubles me as to whether or not we are inviting abuse and whether or not there was any way of monitoring. I don't suppose there is.

Senator Hatch?

Senator Hatch. Mr. Laird, do you have any estimate of how widespread the practice of library lending of software has become?

Mr. Laird. No formal survey has been done. We have done some telephone surveying, including some I have done myself, and Eileen Cooke of the ALA Washington office can provide you with some data that she has acquired.

It seems to be very limited. A fairly extensive survey of the State of Illinois suggested that many of the public libraries in Illinois either don't lend or lend a few dozen times a year, and this is a very recent survey. So let's say if Illinois is typical—I don't know that it is—there is probably very little of it going on yet.

Senator Hatch. What steps do your members take if they find that a person or a patron has illegally copied a software program—or other copyrighted material, for that matter?

Mr. Laird. I'm unsure. A copyright attorney advised a group of librarians that I met with last week that in case of someone known to be illegally copying, it would be their responsibility to let that be known to the proper authorities.

On the other hand, I believe the law doesn't make or doesn't intend to make librarians into police. So I think libraries try to tread very softly on that issue because they don't know who is guilty and who isn't.

Senator **Hatch**. Mr. Kennedy, during an earlier hearing on this legislation it was pointed out that many computer software publishers do attempt to work out special licensing agreements when dealing with libraries so that the products can be used by patrons. One example that comes to my mind is the use of Lexis or Westlaw, as many law schools do in their own law school libraries. Based on your knowledge of these situations, why are these type of arrangements not adequate?

Mr. **Kennedy**. I think that the economic situation of Mead Data Central and the West Publishing Co. is probably different than other software manufacturers. Mead and West promote their products in law school libraries to teach law students how to use their databases with the idea that the students will use their products in law firms later. So, in fact, this software licensing arrangement is part of a commercial marketing program.

I don't think that other software manufacturers are in the same economic position and so generous software licensing may not be a viable option for other software manufacuturers.

Senator **Hatch**. I think that is all I have, Mr. Chairman.

Senator **DeConcini**. Thank you.

Thank you gentlemen very much. You have been very helpful.

Our last witness will be Mr. Troy Cooper, vice president of Erol's, Inc., Video Software Dealers Association here in Washington, accompanied by the prominent lawyer, Burt Wise.

STATEMENT OF TROY COOPER, VICE PRESIDENT, EROL'S, INC., VIDEO SOFTWARE DEALERS ASSOCIATION, WASHINGTON, DC, ACCOMPANIED BY BURT WIDES, ATTORNEY

Mr. **Cooper**. Thank you Mr. Chairman and Senator Hatch. My name is Troy Cooper. I am the vice president of Video Club Operations and Sales for Erol's, Inc., a suburban Washington, DC-based video sale and rental chain. We have 186 stores in six States and the District of Columbia, and approximately 1 million member families.

I am appearing on behalf of the Video Software Dealers Association. The VSDA is a national trade association in the home video retailing and distributing industry. Its members operate thousands of home video stores throughout the Nation which provide millions of American families throughout the Nation with affordable home-centered family entertainment.

VSDA does not oppose the intended thrust of S. 198, which is, namely, to protect copyrighted computer program software which is rented primarily for the purpose of copying and can be easily copied; however, home video retail stores across the country are extremely concerned about the overbroad definition of what is covered by S. 198.

The VSDA urges that the definition be clarified to exclude coverage of home video game cartridges because the bill was not intended to cover them.

The Congress has been willing to cut back the consumer protection of first sale only when the overwhelming purpose of renting copyrighted products would be to copy them; thus, Congress decided not to disturb this doctrine in the case of millions of Americans who rent videocassettes.

They did restrict first sale with regard to sound recordings, but only after concluding that virtually the sole reason for renting records would be to make copies of them in lieu of a purchase.

S. 198 would modify the Copyright Act so as to permit software copyright owners to prohibit rental of software. However, the language could well cover the electronically coded instructions contained in home video game cartridges which many home video retailers now rent to families throughout the country. It would permit manufacturers either to prevent consumers from renting them altogether, or to boost their rental price dramatically. Yet, none of the reasons offered to justify this further departure from the first sale rule apply to these cartridges.

Proponents claim that the overwhelming reason for renting computer software is to copy, and that such software can be easily copied in minutes by anyone. They note that there are few, if any, reasons to rent such software other than to copy it. The basic benefit of such software to the user lies in his mastery and repetitive use of it over a long period of time and with the user's ongoing entry of information. It cannot be enjoyed for an evening's entertainment. Also, the substantial expenditure of the rental price, which is $30 to $50, would not be justified for most people for a night's or weekend's entertainment.

In contrast, these reasons for the bill simply do not apply in the case of home video game cartridges. Clearly, the overwhelming purpose for renting these cartridges is not to copy them. Indeed, the electronic game instructions embodied in the microchip circuitry of the cartridge are virtually uncopyable by consumers. Copying would require engineering expertise and sophisticated gear.

Even if they could be copied, these home video game cartridges are rented to provide a day or a weekend's entertainment. They can be learned relatively quickly with simple instructions.

The price of renting the cartridges is only a few dollars. Renting a game is comparable to going to a movie or renting a videocassette film as a way of providing an evening's or weekend's entertainment. The rental market serves to promote educated consumer choice, also, without restricting the number of purchases the consumer can afford to make.

Many parents are reluctant to permit their children to continuously purchase a large number of games without knowing which ones their children will want to play more than a few times. Renting the cartridges is a way to test which ones their families will enjoy enough to then purchase a permanent copy at a retail sales outlet.

At the same time, since rentals expose many prospective buyers to a wider variety of games than they could afford to sample through purchase, this stimulates interest and expands the sales market.

Many of our customers, when they return a rented game, ask us where they can purchase it. In addition, some home video stores now rent the machines on which the cartridges are played. That creates new customers who previously could not have enjoyed the games which, in turn, increases the sales market still further.

In summary, home video games are not the kind of computer program that this bill was intended to cover. They are not rented to copy; they are rented for other reasons. Rentals expand the ultimate sales market and they increase the consumer choice. Rental offers an inexpensive night's entertainment for less affluent families. The definition of computer program in S. 198 should be refined to clearly exclude them.

Thousands of our customers throughout the country enjoy renting home video games, along with home video movies. Please don't change the law at their, and our, expense.

Thank you very much.

I would be happy to answer any questions you might have.

[The prepared statement of Mr. Cooper follows:]

STATEMENT OF THE VIDEO SOFTWARE DEALERS ASSOCIATION ON S. 198, THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1989

I. INTRODUCTION

The Video Software Dealers Association ("VSDA") and its members appreciate the opportunity to present their views on S. 198, the proposed Computer Software Rental Amendments Act of 1989. VSDA is the national trade association of the home video retailing and distributing industry, which provides millions of American families throughout the Nation with affordable, home-centered family entertainment.

VSDA does not oppose the intended thrust of S. 198, namely, to protect copyrighted computer program software which is rented primarily for the purpose of copying and can be easily copied. However, VSDA does believe the present statutory language of S. 198 is overbroad and should be narrowed because it could well be held to cover, inadvertently, products which do not fall within the rationale of the bill.

Home video retail stores across the country, however, are extremely concerned about such potential overbroad coverage of S. 198. VSDA urges that S. 198 be amended to exclude coverage of home video game cartridges, a highly popular form of family home entertainment. Those cartridge games do not fit the rationale advanced in support of S. 198; the bill was not intended to cover them. Unlike the case of sound recordings, and unlike the case of sophisticated computer software programs, the impact of the bill on these cartridge video games would not be to prevent massive copying, but simply to permit the manufacturer to restrict rentals.

II. THE FIRST SALE DOCTRINE

Before turning to S. 198, itself, a brief review of past congressional action in this area provides helpful background.

The present language of the bill would substantially repeal the "First Sale" doctrine with regard to all software computer programs. The First Sale doctrine, contained in Section 109 of the Copyright Act, is a long-standing principle of federal copyright law. Essentially, the First Sale rule says that, once a copyright owner sells his product, he may no longer use the copyright to control what his customer does with it. The owner of the copyrighted work can control the distribution of copies only up to the point at which he first sells each copy.

For over seventy-five years, the First Sale rule has well served the American people, preserving the balance between the creator's right to reward for his effort, and the public interest in the widest availability of the created work. Any effort to modify First Sale should be undertaken with precision, and should proceed only to the extent there is a compelling case for further undermining this consumer safeguard. That is especially true, as this Subcommittee and its counterpart in the House of Representatives both have repeatedly acknowledged, because of the pace of new technological development and the kaleidoscopic distribution patterns devised to serve consumers. In this complex environment, it is exceedingly difficult to discern and predict, let alone properly balance, all of the implications that any weakening of the First Sale doctrine would have for consumers, small business, antitrust principles, and other important public policy concerns.

Thus, Congress, after prolonged consideration and an outpouring of consumer concern, decided not to disturb this doctrine in the case of millions of Americans who rent films on videocassettes. Subsequently, Congress did restrict the First Sale rule with regard to sound recordings, after concluding that virtually the only reason for renting records would be to make copies of them in lieu of a purchase.

In short, the Congress has been willing to cut back the consumer protection of First Sale only when the overwhelming purpose of renting copyrighted products would be to copy them. The Congress found that to be the case with regard to records. For videocassettes, it obviously is not true. Where it is not clear that the overwhelming reason is to copy, there is no compelling policy justification for altering the First Sale doctrine to the detriment of the consuming public.

III. S. 198

With that background, we can address the specific terms of S. 198 and the reasons offered for the bill. S. 198 would modify existing Section 109(b) of the Copyright Act. Presently, subsection 109(a) contains the basic First Sale rule, while subsection (b) is the text of the Record Rental Act that modifies the rule as to sound recordings. S. 198 would insert a reference to "computer software" into subsection (b), so as to permit software copyright owners, like owners of sound recording copyrights, to prohibit rental of such software.

The problem lies in the language used to define the computer software that S. 198 seeks to protect. The bill would insert the words,

> "or the owner of copyright in a computer program (including any tape disk, or other medium embodying such a program) . . . ."

This language, by including a broad range of "computer program" formats, could well be held on its face to cover the electronically coded instructions contained in home video cartridge games, which many home video retailers now rent to families throughout the country. Although the bill clearly was not intended to cover them, those coded instructions could be found to be "computer programs" within the definition of that term in 17 U.S.C. 101. That would permit their manufacturers either to prevent consumers from renting them altogether, or to boost their rental price dramatically, beyond the reach of many families as a source of regular home entertainment. Yet, none of the reasons offered to justify this further departure from the First Sale rule apply to those cartridges.

Last year, the subcommittee held field hearings on this legislation. Both at that hearing and in Senator Hatch's floor remarks this year introducing S. 198, a number of reasons were presented to justify further departure from the First Sale rule.

The bill is offered to protect expensive computer software programs on floppy disks which are used for word processing, spreadsheets, and a variety of other applications. Proponents claim that, as in the case of sound recordings, the overwhelming reason for renting such computer program software is to make an unauthorized copy. Proponents emphasize that such software can all be easily copied in seconds by anyone using only their computer and a blank disk, or the computer memory.

Moreover, the witnesses indicated that they could think of few, if any, reasons to rent such expensive software, other than for purposes of copying. The benefit of such software to the user lies in repetitive use over a substantial period of time, and in the user's ongoing entry of information. As Senator Hatch has noted in introducing S. 198:

> "Computer software cannot be enjoyed for an evening's entertainment and then returned. To have meaning to a user, the software packages require mastery of complex user

> manuals, often running hundreds of pages in length. Even after a user has mastered the use of a program, it has little value until he or she adds his or her own data base to the program."

Also, the substantial investment of the rental price for such software programs -- in the $30 to $50 range -- would not be justified for most people by a nights' or weekend's use.

None of these propositions apply in the case of home video game cartridges.

By definition, Congress can hardly conclude that the "overwhelming purpose" for renting these cartridges is to copy them. The game programs embodied in the microchip circuitry of the cartridge are virtually uncopyable by consumers. Not only would copying require a level of expertise well beyond that of any consumer who is not an engineer or computer technician, but it also would, even for a person with the necessary expertise, require so much time, sophisticated equipment and expense as to make it pointless to rent a game cartridge in order to copy it, in lieu of simply buying one.

Even if they could be copied, these video game cartridges are rented precisely to provide a day's or weekend's entertainment. They can be learned relatively quickly with relatively simple instructions. The fun of playing them is not necessarily dependent on their use over long periods, or on the ongoing insertion of data by the consumer.

Further, the price of renting the cartridges, while varying among retailers, is only a few dollars -- the same range as a videocassette rental. Thus, once families have purchased the control deck, or player mechanism into which the cartridge is inserted, renting a game is competitive with going to a movie or renting a videocassette film as a way of providing an evening's or weekend's entertainment. The limited additional rental expenditure makes sense for that purpose.

Even families able to purchase a substantial number of cartridge games also avail themselves of the opportunity to rent them. Many parents are reluctant to permit their children to continuously purchase a large number of games without knowing which ones their children will want to continue to play for a long time. For them, renting the cartridges is a way to test which ones their families enjoy enough to warrant purchasing a permanent copy at a retail sales outlet. Thus, the rental market serves to promote educated consumer choice, without restricting the number of purchases the consumer can afford to make.

At the same time, by exposing prospective buyers to a wider variety of games than they could afford to sample through purchase, the rental system helps to stimulate interest and to expand the manufacturer's sales market. To the extent home video stores are also beginning to rent the necessary device for playing these cartridges in the home, they create new customers who previously did not have the capability to enjoy the games, and thereby further increase the sales market.

IV. CONCLUSION

In summary, home video game are not the kind of "computer program" that this bill was intended to cover. They are not rented to copy. They are rented for other reasons, often reasons which help the manufacturers expand their ultimate sales market. They provide consumers with more choice and ability to make informed purchases. Their rental is an inexpensive night's entertainment for less affluent families. Therefore, the definition of "computer program" in S. 198 should be refined so as to clearly exclude such home video games.

Thousands of our customers throughout the country enjoy renting home video games, along with home video movies. Please do not change the law at their, and our, expense.

Senator DeConcini. Thank you.

Senator Hatch?

Senator Hatch. Thank you, Mr. Chairman.

I understand you have worked closely with the Software Publisher's Association and you pretty well have an agreement on the amendment that we need to put into this bill to clarify the language. But, as I understand it, some of these video games can be copied because they are on floppy disks or cassettes. Do you cover those in this amendment?

Mr. Cooper. The amendment that we are proposing specifically deals with the cartridge-type games that——

Senator Hatch. Limited to the cartridge?

Mr. Cooper. Yes.

Senator Hatch. That's all I needed to know. Thank you. We appreciate your testimony.

Mr. Cooper. Thank you, Senator Hatch.

Senator DeConcini. Mr. Cooper, the only question I have is: Do you have any licensing agreements with the manufacturers of some of these games?

Mr. Cooper. No, sir, we do not.

Senator DeConcini. You just buy them and then rent them?

Mr. Cooper. Buy them and rent them. Correct.

Senator DeConcini. Have you ever tried to get a licensing agreement?

Mr. Cooper. No, sir.

Senator DeConcini. Thank you. I have no further questions.

Mr. Wides. Sir, I might add that many home video stores have tried to purchase cartridge games from some of the leading manufacturers and been unable to do so. They are not willing to sell them to them.

Senator DeConcini. So they just don't have them? Some of them are not for sale, you mean?

Mr. Wides. Not willing to sell them to the store.

Senator DeConcini. Sell them to your clients?

Mr. Wides. Right.

Senator DeConcini. Thank you very much, gentlemen.

The subcommittee will stand in recess subject to the call of the Chair.

[Whereupon, at 3:30 p.m., the subcommittee was recessed, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

Suite 600
1112 Sixteenth Street, NW
Washington, DC 20036
202 872-4200
FAX: 202 872-4318

May 3, 1989

Mr. Ed Baxter
Chief Counsel
Subcommittee on Patents
Senate Judiciary Committee
Room 224
Dirksen Senate Office Building
Washington, DC 20510

RE: S. 198, the "Software Rental Bill"

Dear Mr. Baxter:

EDUCOM is a consortium of 580 colleges and universities and 125 corporate associates, founded in 1964 and serving the academic computing needs of higher education. During the past few years, the EDUCOM Software Initiative has worked closely with the Software Publishers Association and ADAPSO to increase awareness and understanding of copyright and related issues in higher education. More than 300,000 copies of the brochure "Using Software -- A Guide to the Ethical and Legal Use of Software for Members of the Academic Community," published jointly by EDUCOM and ADAPSO, have been distributed throughout higher education. We also developed the EDUCOM Code, a statement of principle about software and intellectual rights [copy attached].

I am concerned that S. 198, the "Software Rental Bill," may disrupt legitmately established practices on campuses. In discussing S. 198 with colleagues from several colleges, universities, and higher education associations, we find general support for the software industry's effort to restrict commercial rental of software for the purpose of illegal copying. Further, higher education recognizes the need for a healthy software industry, one which considers higher education an important and viable market.

Unfortunately, the present wording of S. 198 (especially the possibility of interpreting "lend," "library," or "commercial advantage" quite narrowly or quite broadly) may significantly impede important legitimate uses of software and computers in educational institutions -- two in particular:

1) Student access to information technology.

Especially worrisome is the potential impact of the current version of S. 198 on student use of microcomputer laboratories or centers. (Is the institution "lending" software to a student user in these environments? Is a microcomputer center a "library?") These installations are provided to permit those students *who cannot afford to buy their own computers* to have limited access in a monitored environment to what is becoming an essential tool for effective student work -- the use of computer software for learning, writing papers, etc.

Economically disadvantaged students who already begin an undergraduate career with fewer resources than their classmates will find it even more difficult to succeed when the current efforts of the college to provide them with computer resources are severely cut by S. 198.

2) Faculty access to information technology.

Plans to encourage faculty within a college or university to adopt the use of computers to augment their teaching often include making software available to those faculty members (under appropriately controlled conditions) for examination, evaluation, demonstration, or review. For example, a faculty member may request the academic computing department staff to make an institutional purchase of a software package, and then deliver it to that faculty member for use in making a decision about requiring students enrolled in a particular course to purchase the software individually. (Is the institution *lending* the software to the faculty member?)

The current wording of S. 198 may be interpreted as prohibiting this practice, or requiring the time-consuming and costly step of obtaining explicit permission from *every* publisher of *every* software package of interest -- potentially thousands of college and university representatives negotiating with hundreds of software publishers.

Clarification of S. 198 through additions to its "legislative history" does not provide a solution to our problems. Even if some sentences exempting the above practices from the purview of the proposed amendment were included in the legislative history, educators would still bear the risk of expensive litigation to confirm that the desired practices are indeed legal under the new law. If the sentences offered -- or similarly intended language -- were included *within* the legislation, our problem could be solved.

An exclusion for nonprofit libraries, without a parallel exclusion for nonprofit educational institutions, would press colleges and universities to house *all* software collections in formal libraries instead of in computing centers, microcomputer laboratories, or other locations as is often current practice. While we welcome the possibility of libraries providing services related to the distribution of computer software, many college or university libraries are not yet prepared to do so. Individual colleges or universities should be able to assign such responsibilities wherever optimal for the local conditions and resources.

Recommendation:

1) Add language within the legislation parallel to that included in the phonograph record rental amendment legislation of 1984, such as the following:

> Nothing in this Act shall apply to the rental, lease, or lending of a computer program (including any tape, disk, or other medium embodying such program) for nonprofit purposes by a nonprofit library or nonprofit educational institution.

Or,

2) Add language within the legislation that clearly removes the problem of S. 198 unduly restricting the legitimate practices of colleges and universities in providing access to computing resources for students and faculty as described above.

Thank you for your consideration of our concerns in this matter. I would be pleased to provide additional information upon your request.

Sincerely,

Steven W. Gilbert

Steven W. Gilbert
Vice President

NOTE: Frank Connolly of American University is also submitting a statement about S. 198. He provides a thoughtful and pragmatic perspective on the implications of this bill for his plans to encourage and support the legal, ethical, and effective use of software at his insitution.

The EDUCOM Code

Software and Intellectual Rights

Respect for intellectual labor and creativity is vital to academic discourse and enterprise. This principle applies to works of all authors and publishers in all media. It encompasses respect for the right to acknowledgment, right to privacy, and right to determine the form, manner, and terms of publication and distribution.

Because electronic information is volatile and easily reproduced, respect for the work and personal expression of others is especially critical in computer environments. Violations of authorial integrity, including plagiarism, invasion of privacy, unauthorized access, and trade secret and copyright violations, may be grounds for sanctions against members of the academic community.

GEORGETOWN UNIVERSITY LAW CENTER

Fred O. Dennis Law Library
Bruce Kennedy
Head of Reference

Mr Edward Baxter
Chief Counsel & Staff Director
Senate Subcommittee on Patents,
 Copyrights & Trademarks
United States Senate
Washington D.C. 20001

May 4, 1989

Dear Mr. Baxter;

Enclosed is a brief additional comment on S 198 by the American Association of Law Libraries.

Sincerely yours,

Bruce M. Kennedy
Chair of the Copyright Committee
American Association of Law Libraries

600 New Jersey Avenue NW Washington DC 20001-2022
202-662-9144

ADDITIONAL COMMENTS ON BEHALF OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES

by

BRUCE KENNEDY

Chair of the Copyright Committee
of the American Association of Law Libraries

on

S.198; THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1989

A proposed amendment to S 198 would require non-profit libraries to affix a copyright warning on the packaging of a computer program before it is loaned to a library user. The amendment stipulates the text of the warning which begins as follows:

> WARNING: THIS COMPUTEP PROGRAM IS PROTECTED UNDER THE COPYRIGHT LAW ...

This sentence would be improved by a minor change in wording. The word "is" should be changed to "may be".

As it is currently worded, the warning is unequivocal; it purports to apply to all software programs. Yet libraries collect and lend public domain software which is not protected by the copyright law. This means a librarian would have to determine whether or not a given program is copyright protected before deciding if the warning is appropriate. However, if the warning states that a program "may be" protected, the label can be applied to all programs without any investigation. This minor change should not dilute the impact of the warning to would-be software pirates.

Again, AALL thanks the Subcommittee for this opportunity to be heard.

THE AMERICAN UNIVERSITY
WASHINGTON, D.C.

May 4, 1989

Mr. Ed Baxter, Chief Counsel
Subcommittee on Patents
U.S. Senate Judiciary Committee
Room 327 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Baxter:

Thank you for talking with me yesterday. Your insights on the rationale for S.198 and procedures for getting a statement into the formal record were most helpful.

Attached is a statement submitted for inclusion into the formal record for S.198. As I indicated in our conversation, although I fully support the intent of the amendment, I have serious concerns about its impact on The American University and educational institutions in general. My statement focuses on the specific impact S.198 has on AU. I understand that Mr. Gilbert, the vice president of EDUCOM, is submitting a statement from that organization which deals with S.198 from a more global perspective. I hope these statements clearly present the concerns of higher education for you and the Subcommittee members. Obviously, if you have questions, please let me know so I can clarify them.

As I am not familiar with the processes of legislative development, I appreciate your assistance and suggestions. If there are future hearings on S.198, I would like the opportunity to address the subcommittee, but I need to know how one gets on a witness list. If there are other avenues I should be pursuing, please let me know.

Thank you for your assistance.

Sincerely,

Frank W. Connolly, Ph.D.
Director, Academic Computing

University Computing Center
4400 Massachusetts Avenue, N.W., Washington, D.C. 20016 (202) 885-2270

Statement of Frank W. Connolly, Ph.D.
Director of Academic Aomputing and
Associate Professor of Information Systems
The American University

RE: S. 198

To amend title 17, United States Code, the Copyright
Act to protect certain computer programs

Summary

In summary:

1) support the intent of the amendment to protect the interests of software developers by controlling the rental, lease or loan of software;

2) request that the exemption proposed specifically for not-for-profit libraries be extended to include not-for profit educational institutions; and

3) accept the proposal that a warning notice be affixed to all software when loaned by not-for-profit libraries and educational institutions.

Personal Credentials

My statement is presented as one who has significant experience with software issues and problems at educational institutions. I have over 22 years as a professor and administrator in higher education, all in computer related areas. In addition, professionally I am actively involved with other institutions through membership in:

the Eastern Small College Computing Conference,
the Washington Area Computing Center Directors Association,
Association for Computing Machinery (ACM), and its Special Interest Groups on University Computing Center Services, and Computer Science Education, and
acting as American University's representative to EDUCOM.

In addition, I hold a doctorate in Educational Administration and have acted in a consultant and training capacity with public and private schools in metropolitan Washington, D.C.

At present I am the Director of Academic Computing and an associate professor in the Department of Computer Science and Information Systems.

The American University Setting

The American University (AU) is a private, comprehensive university, located in Washington, D.C. Like all universities, we strive for excellence in our academic programs, and are proud of our record in educating leaders in government and industry. In today's society, that academic experience is more and more dependent upon and involved with computers and computing. We attempt to make computing resources readily available to all members of our academic community, students and faculty. To address this facet of the modern educational mission, AU operates a mainframe computer center, electronic classrooms and eleven (11) computer laboratories serving general purpose and specialized needs of departments, including laboratories for:

Learning disabled
Business
Psychology
Social Science research
Computer Science and Information Systems
Foreign Languages
Writing
Print Journalism
Law

Evaluating and selecting software for these facilities is a complex, continual process. Not only must resources be available, but faculty must be able to assess the power and limitations of software to determine whether or not it matches with their pedagogical objectives.

To assist faculty in evaluating software for classrooms, laboratories and for integrating computers into their courses, we operate and staff a special facility where faculty can come and preview software. Staff members in this facility also develop demonstrations, convene colloquia and provide specialized training to encourage wider consideration of software by faculty. In addition, we have a fulltime training and documentation staff who offer courses on using various software applications, and write documentation specifically tailored to assist faculty in using applications. Earlier this month we conducted our annual one-day conference on computing specifically aimed at professors and their teaching.

Although our efforts have been on-going since 1982, our progress to-date can at best be described as "marginal." Of our 460+ fulltime faculty, over 80% are computer literate, using computers for the personal writing and research. But, there are fewer than 40 (less than 1%) who integrate the computer into their classroom repertoire. This lack of success is attributable to numerous strategic, resource, evaluation and organization factors within universities. But, like numerous other institutions of higher education in the U.S., the University is committed to exploiting the power that computers hold for education. In fact, as Director of Academic Computing my primary mission is to further the adoption of computer-based technologies to enhance the academic programs of the University. There are thousands of other Directors and Coordinators of Academic Computing with similar charges at universities, colleges, and community colleges across the U.S. In blunt terms, the literature and research on the results consistently indicate **it's a hard sell.**

Our library has numerous computers in staff offices for staff use, but only two computer systems available for library patrons. These two are dedicated to using CD ROM data bases, not software evaluation. The American University Library does not maintain a collection of software and has no staff to support faculty in using even the limited resources it has.

Although The American University is not a technology leader in the same league as Stanford, Carnegie-Mellon, or MIT, we spend literally millions of dollars annually to make computing available to our faculty and students. In fact, AU provides significantly more computing resources to its students and faculty than the majority of higher education institutions in the U.S.

Providing resources and support **does not mean** that we illegally copy or distribute software. At American University, as at other colleges and universities, we spend a significant amount of time, energy and resources strictly enforcing the intellectual property rights of software creators. Elaborate procedures are in place in laboratories to insure that unauthorized copies cannot be made -- software locks on networks, and 24-hour a day staff when physical diskettes are the medium of distribution. Laboratory staff are trained to watch for attempts to copy software, and how to handle the situation if it occurs. Students are charged under the University's Code of Conduct and face expulsion, fines and loss of privileges for violations of software copyrights. Faculty and staff fall under a similar code for employees that is enforced via their deans or supervisors and leads to formal disciplinary actions, including the possibility of dismissal from the institution. We take copyright seriously.

Planned Outreach to Faculty

Because of our limited past success, over the past semester we devised a new initiative to begin in September 1989, when faculty return to campus for the new semester. We sought to undertake a proactive outreach effort to reluctant faculty to encourage wider adoption of software for classroom teaching. The program involves computer center staff working with faculty **in the faculty member's office** to demonstrate software possibilities and to actively assist the faulty member in developing sample classes. The hope is that the faculty member will decide to adopt the package, and then will demonstrate it to his/her peers for their consideration and adoption. The overall intent is to encourage wider adoption of the software, throughout an academic unit. The faculty members involvement in such an effort is significant -- defining objectives, selecting strategies, setting up data files, etc. One impediment in our current efforts is the need for faculty to come to our center. Therefore, our planned outreach intends to loan the software to the professor while he/she develops the demonstration classes and exercises.

The cost of purchasing software for evaluation purposes, coupled with the number of software packages to be evaluated, prohibits private institutions (and I assume most public ones) from purchasing copies of software for every department which might be a potential purchaser. At the same time, we **do not** anticipate having multiple copies of the software circulating, as the effort was intended to focus on a single, target department at a time. With the completion of the evaluation, the software would be returned to the computing center. If the software did not satisfy the needs of the teaching unit, no additional purchases would made. If the demonstrations were positively received, additional copies of the software would be purchased for use in the department or in the appropriate laboratory on campus.

There are four critical points in this model which are important the University and software creators:

1. **In the short term,** loaning software to the various academic units clearly intends to avoid purchasing multiple copies of software that do not meet the needs of the institution,
2. No extra copies of the software are made or used,
3. **In the long term,** the software publishers will benefit as software will be more widely adopted and purchased, and,
4. Students have the benefit of an education enhanced by instructional computing that otherwise would not have occurred.

Impact of S.198 on The American University

Intentionally or not, S.198 is clearly directed at the outreach effort we planned to undertake. The pending legislation of itself has already postponed our planning and implementation efforts. It's passage will terminate this effort and future ones like it at AU and other institutions. There are no other good alternatives because:

1. The cost in time and personnel to obtain written permission from every software publisher for every package to be evaluated will add significantly to our operations and simultaneously limit the number of packages that can be considered.

2. The threat of legal action for undertaking this new effort without getting permission from the publishers is not a prudent decision for an institution with limited resources. Further, at a time when ethical behavior should be at a premium, for an educational institution to ignore the copyright laws while teaching our students to adhere to it is hypocritical.

3. Moving my entire operation to the University Library would take years to implement. Further, it seems inappropriate for legislation to dictate the organizational structure of private educational institutions.

Summary

The intent of the S.198 is commendable. We are all in agreement with the need of software publishers and creators to protect their rights. However, S.198 as it stands is flawed. The long term impact of S.198 as it now stands will be to slow the adoption of software and therefore reduce the sales of software. No one is a winner -- not universities, not faculty, not students, not the creators of the packages.

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June 5, 1989

Mr. Ed Baxter
Chief Counsel
Subcommittee on Patents, Copyrights and Trademarks
Committee on the Judiciary
327 Hart Senate Office Building
U.S. Senate
Washington, D.C.

Dear Ed:

The enclosed letter represents the position of Nintendo of America on S.198, and the proposed amendment supported by the Video Software Dealers Association. We will be writing all the other members of the Subcommittee this week, so you don't necessarily need to circulate this letter.

Howard Lincoln of Nintendo of America will be here Thursday for meetings. I am sure you know that our appointment with Senator DeConcini is at 5:30 p.m. I will be accompanying him, and I look forward to seeing you there.

Hopefully it is not too late for inclusion of this letter in the official record of the Subcommittee. I very much appreciate your flexibility in this regard.

Sincerely,

Donald F. Massey
Senior Vice President

Nintendo
Nintendo of America Inc.

June 5, 1989

VIA MESSENGER

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents, Copyrights, and Trademarks
Committee on the Judiciary
328 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Subcommittee on Patents, Copyrights, and Trademarks has under consideration S.198, the "Computer Software Rental Amendments Act of 1989," which would ban the rental of computer software, unless agreed to by the software copyright owner. As testimony at the Subcommittee's April 19 hearing indicates, the rental market and its facilitation of the illegal copying of software represent a major threat to copyright owners. As one of the world's largest software developers and distributors, Nintendo has a tremendous stake in this issue. We endorse S.198 as introduced by Senator Hatch.

Nintendo is one of the leading members of the computer software industry, as measured by its innovation and unquestioned product leadership. Nintendo of America was established in 1980, with headquarters in Redmond, Washington. During the past decade, we have become a major employer in the Seattle area, supporting more than 350 permanent and more than 750 temporary employees. Additionally, our subsidiaries NCC Sales and NES Merchandising Inc. employ another 150 people across the U.S. in various sales and service capacities.

Other segments of U.S. industry benefit tremendously from Nintendo's successes. More than 12,000 retailers who carry the Nintendo Entertainment System credit Nintendo with revitalizing the home video game industry, by growing 1985 sales of $100 million to the $2.3 billion level in 1988. Nearly fifty other companies spread throughout the U.S. develop software for the Nintendo Entertainment System, and an equal number of separate firms profit from distribution of our products to the retailers.

During recent hearings, testimony was presented by the Video Software Dealers Association (VSDA) in favor of an amendment which would create a statutory distinction between software formats, and deny the protection intended by S.198 to the cartridge format. We strongly oppose this amendment. It inaccurately dismisses the threat of cartridge copying; it creates inappropriate distinctions in the copyright law in the treatment of software formats, which will become even more untenable and unworkable in the future; it threatens the viability of the cartridge format, which may lead to adverse consequences for consumers who have already invested in this format; and it would not allow cartridge software developers the ability to fully reap the fruits their labors. Finally, by the creation of this distinction, the amendment would strongly influence the development of the industry, through the favoritism shown to non-cartridge formats.

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Nintendo
Nintendo of America Inc.

The Technology to Copy Cartridges Has Already Been Developed and Will Soon Be Widely Available

The technology for copying software cartridges has already been developed, and is being employed for illegal commercial purposes in Taiwan and Hong Kong. In fact, a company in Taiwan advertises that their technology — which is available for home use -- "can be used to copy the games on a Nintendo floppy or cartridge . . . an unlimited number of times." I have enclosed a copy of an advertisement for this equipment.

It is only a matter of time before this technology is widely available in the U.S., as the pace of technological development in the industry is accelerating rapidly. As examples, consider that the entire personal computer industry did not exist fifteen years ago, and the video cassette recorder has only received widespread household use in the last five years. The technology to flawlessly copy compact disks has already been perfected.

By the end of this year, at least one in every four homes will have a video cartridge system. Given this enormous popularity there is tremendous incentive to bring home copying technology to the U.S. marketplace. Its use here will be accelerated if S.198 makes cartridges the only unprotected software format.

Nintendo has already experienced difficulty with rental establishments, which are clearly violating the copyrights of our game instructional materials. As cartridges are rented again and again, user manuals are soiled, destroyed, or simply not returned. In order to continuously rent the title, rental companies reprint or photocopy our copyrighted materials without our permission. Many establishments keep the original document for future copying needs, and only give out unauthorized copies with the rental games. In an effort to protect our legitimate copyright interests, Nintendo may have to devote its legal resources to stopping this illegal copying.

Software Format Should Be Irrelevant to the Right of Protection

The VSDA amendment would create an artificial distinction between cartridge-based software and disk-based software. Any notion that the cartridge format is used only for games, while the disk format is used for other applications, is outdated. A substantial portion of the software disk industry is tied to sales of game software for computers, while more and more applications are being developed for the cartridge format. All software requires a substantial investment. It is not uncommon for a single program to take more than nine months to develop, at an expense of greater than $250,000.

Many business and educational uses can and have been incorporated into cartridge format software. Outside the U.S., Nintendo markets a cartridge system to enable stock trading to be accomplished through the use of a modem. Likewise, a great deal of educational software is produced in the cartridge format by Nintendo and other developers.

Nintendo
Nintendo of America Inc.

Any software program can be put on either disk or cartridge, but S.198 will only protect disks. This is neither fair, nor sensible. An amended S.198 would set up the Congress as an arbiter of technology and as an advocate for one product over another. It would grant an unfair creative and competitive advantage to certain types of hardware systems, and create a strong bias in the competitive environment instead of allowing consumers to exercise their economic votes on a "level playing field."

As this fast-growing industry continues to develop, statutory distinctions between software formats will become even less tenable. Entirely new formats on the horizon will further complicate the issue, and totally destroy the rationale of the VSDA amendment.

Loss of Software Sales Could Jeopardize the Viability of Cartridge Format Hardware

The Nintendo Entertainment System is a sophisticated electronics system with custom-designed eight-bit picture processing and central processing units. We use the same microchip technology found in personal computers. In fact, most of our cartridges have more memory capacity than many mainframe computers had twenty years ago.

The economic viability of a particular hardware design is highly dependent on the economic integrity of the associated software. Software sales must justify the continuing production of the particular hardware design. By undercutting the relative commercial value of the cartridge format by exempting it from the protections afforded all other formats, the value of all such hardware held by consumers may decline. The steep drop in sales which the rental phenomenon presages could force us to re-examine the commitment to the cartridge format, perhaps forcing the millions of consumers who own our video game system to pay to convert their cartridge-based hardware to accommodate another type of software.

Right to Fair Profit and Copyright Protection

Although S.198 focuses on the problems of software rental, particularly the threat of illegal copying, the underlying purpose of the legislation is to preserve the economic interest of copyright holders. The Subcommittee has a long history of concern about challenges to the integrity of the copyright process like this one. The Software Publishers Association (SPA) believes that, much like the music recording industry, the software industry is threatened when their products can be rented without the copyright holder's permission. We wholeheartedly agree with this rationale for the bill.

However, because the majority of members of the SPA do not produce cartridge-based software, they have not objected to the VSDA amendment. Furthermore, because sales of home video game software have eroded the disk-based game software of many members of the SPA, they in fact have an incentive to see this amendment adopted. It would provide a means to limit competition and secure dominance for the disk-based software format.

The Video Software Dealers Association would have you believe that cartridge-based software is like a movie, and should be treated similarly under the law in regard to rentals. This simply is not the case.

The motion picture industry has many avenues at its disposal to recoup its investment. They generate revenue by renting the films for showings at commercial theaters; they can get royalties from cable; they receive revenue for showings in broadcast networks; they earn royalties from pay-per-view television; they can sell videotape copies to consumers; and they generate additional revenues by selling video tapes to businesses that will in turn rent them to consumers.

Even the music recording industry can generate revenues through more than one means. They earn royalties when their products are played by commercial radio stations; they earn royalties when their works are played in public places; and they sell records to consumers.

For video game software, there is only one means of generating revenue -- sale of the product to the consumer. Much of the newest generation of video game software does not lend itself to arcades, thus eliminating that conduit for revenue. Rental of software without allowing the copyright holder to grant permission or share in the profits, coupled with the threat of copying, will have a very severe economic impact on our industry. If rentals cause fewer sales (as was cited in the creation of the Record Rental Agreement of 1984) then the multi-million dollar design, manufacturing, marketing, and distribution costs have to be shared by a smaller number of consumers, which drives up the price of the software. Fewer people buy, and the cycle intensifies as the industry declines.

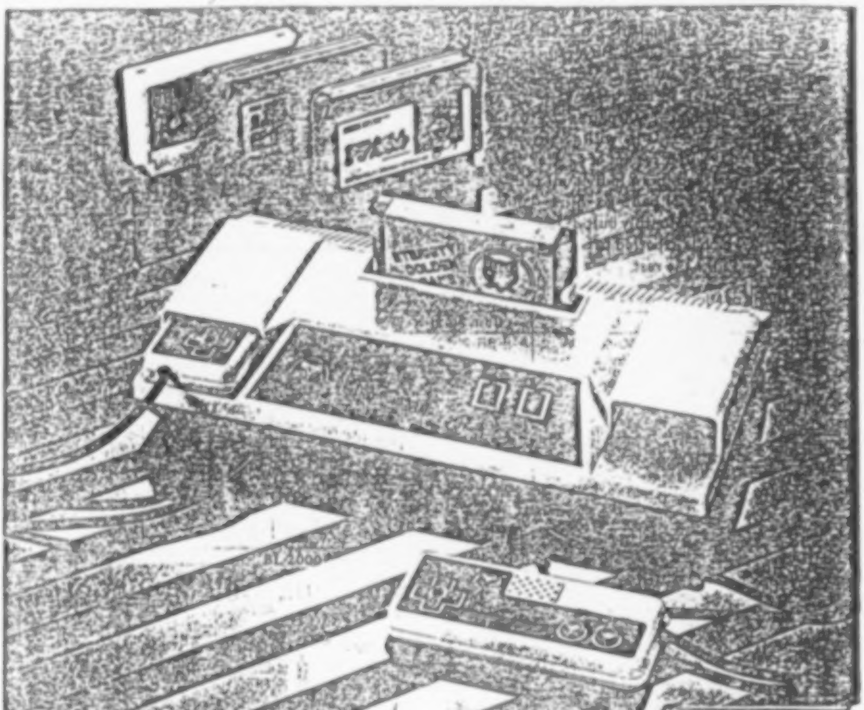
Mr. Chairman, Nintendo of America appreciates your time and attention to the serious threat to the copyrighted software market embodied in rentals and copying. I hope you agree that there is no valid reason to distinguish between copyright formats, and that you will oppose denying the important protections of S.198 to any segment of our industry.

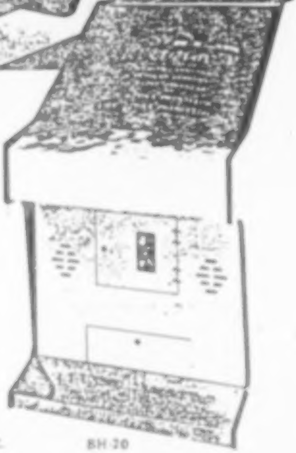
Sincerely,

Howard C. Lincoln

Howard C. Lincoln
Senior Vice President
Nintendo of America

Great Fun From Our Video Games & TV Games





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[illegible]

AMERICAN COUNCIL ON EDUCATION
Division of Governmental Relations

June 13, 1989

The Honorable Dennis DeConcini
Chairman
Subcommittee on Patents, Copyrights
& Trademarks
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On behalf of the American Council on Education, an association representing over 1,500 colleges and universities and the organizations listed below, we would like to register our strong opposition to S. 198, the Computer Software Rental Amendment Act. The legislation would carve out a totally new right for the copyright owners of software without providing adequate safeguards for the legitimate and established practices of educational institutions.

Prior to 1984 a copyright owner had the exclusive right to control the distribution of his or her copyrighted work (17 U.S.C. § 106(3)) but only until the time of its "first sale" (17 U.S.C. § 109). After the "first sale" the owner of a copy could redistribute the copy to whomever or in whatever manner he or she chose. In 1984, for the first time, a very limited exception to the first sale doctrine was enacted by Congress when it passed the Record Rental Amendment. That amendment extended the distribution right in the Copyright Act to include the rental, lease, or lending of phonograph records. In carving out this limited exception, Congress was careful to exempt nonprofit libraries and educational institutions from the sweep of this new right. Unfortunately and inexplicably, S. 198 does not provide the same safeguard for nonprofit institutions which engage in the rental, lease or lending of software.

When it passed the Record Rental Amendment, Congress specifically stated that the legislation should "not interfere with the usual lending activities of nonprofit libraries or the educational program of nonprofit educational institutions" (House Report No. 98-987) (2d Sess., 98th Cong. 1984 p. 5). This legislation would interfere with those lending activities. We can find no rationale for making nonprofit educational institutions potential copyright infringers for lending software when those institutions have the right to lend any other type of copyrighted work, including phonograph records, without payment, permission or potential punishment.

Colleges, universities and students take no comfort from the exemption which imposes liability only if the distribution is "for the purposes of direct or indirect commercial advantage." Is it the lender or the borrower who must be without commercial benefit? If the borrower, must the lender inquire as to the purpose for which the software is to be used? Would a student who borrows the software to prepare an employment application be using it for "commercial

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advantage?" Would a university who is seeking to increase its enrollment by establishing a computer laboratory be found to be involved in lending software for "indirect commercial advantage?" Software association representatives have said that the legislation was not meant to stop the lending of software by colleges or universities. Our members need a clear statutory exemption sufficient to direct their activities and to enable them to meet the requirements of the law. Assurances are not an adequate substitute.

We would support passage of S. 198 if nonprofit libraries and educational institutions can continue to rent, lease or lend software free of liability, as they rent, lease or lend every other type of copyrighted work.

We would be pleased to meet with you or your staff to discuss this issue further.

The following associations join ACE in this statement:

American Association of Community and Junior Colleges
American Association of State Colleges and Universities
Association of American Universities
Association of Catholic Colleges and Universities
Association of Jesuit Colleges and Univeristies
Association of Urban Universities
Council of Independent Colleges
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of State Universities and Land-Grant Colleges

Sincerely,

Sheldon Elliot Steinbach
Vice President and General Counsel

cc: Members of the full Committee

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUL 28 1989

Honorable Dennis DeConcini
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for the opportunity to present the views of the Department of Justice on S. 198, the "Computer Software Rental Amendments Act of 1989." This bill, patterned on the Record Rental Act of 1984, Pub. L. No. 98-450, 98 Stat. 1727, would amend 17 U.S.C. § 109(b) by extending the existing ban on unauthorized rental or leasing of copyrighted sound recordings to copyrighted computer programs.

The Justice Department defers to other interested agencies concerning the policies embodied in S. 198. We note, however, that application of the bill's restrictions to current owners of copyrighted computer programs could raise a serious issue under the Just Compensation Clause of the Fifth Amendment by depriving them of a vested right under existing law. *Cf. Roth* v. *Pritikin*, 710 F.2d 934, 939 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983); 1 *Nimmer on Copyright* § 1.11 (1982). In this regard we note that application of the bill's provisions to current owners of copyrighted works would not advance the purpose of the Copyright Clause of the Constitution "[t]o promote the Progress of Science and useful Arts", Art. I, § 8, Cl. 8. Obviously it is not necessary to provide incentives for the creation of already existing copyrighted works. *Cf. Hodel* v. *Irving*, 107 S.Ct. 2076, 2083 (1987); *Nollan* v. *California Coastal Comm'n*, 107 S.Ct. 3141, 3148 (1987). We would further point out that Section 4 of the Record Rental Act of 1984, which added Section 109(b) to Title 17, provided that:

> The provisions of section 109(b) . . . shall not affect the right of an owner of a particular phonorecord of a sound recording, who acquired such ownership before the date of the enactment of this Act, to dispose of the possession of that particular phonorecord on or after such date of enactment in any manner permitted by section 109 . . . as in effect on the day before the date of the enactment of this Act.

Pub. L. No. 98-450, § 4(b), 98 Stat. 1727.

Accordingly, we would advise that S. 198 be similarly revised to limit its effect to computer programs sold after its enactment.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Carol T. Crawford

Carol T. Crawford
Assistant Attorney General

Liverpool Public Library
Tulip and Second Streets
Liverpool, N.Y. 13088-4997

Fay Ann Golden Library Director
(315) 457-0310

S198 and the ComputerWorks Lab

Compiled by Jean Armour Polly, Assistant Director Public Services

The Liverpool Public Library has promoted public access to computers and electronic information since 1981. The ComputerWorks Lab currently contains many types of computers and about 650 pieces of software. Software circulated for home use topped 13,500 in 1988, while another 12,000 pieces were used in the lab itself. Patrons preview the software and many later buy their own copies. Many patrons enjoy the entertainment and educational programs for short-term use.

The public computer lab at Liverpool Public Library was booked for over 12,000 hours in 1988, and most of the usage was by adults. They utilized public computers and software to generate résumés, newsletters, wedding invitations, and many other near-typeset quality items. The most popular computers were the Macintoshes, which are easy to learn and use.

This year was extremely busy, as reflected in the following statistics.

Total	Adults	Kids/YAs/Families	Other (User Groups, etc)
12,321	7,999 67.9%	2,684 22.9%	1,638 9.1%

Of great concern to our patrons is the amendment to Copyright Law, S. 198, the Computer Software Rental Act. The text of the legislation is similar to that of the Record Rental Act of 1985, however, the latter contains an exemption for both libraries and educational institutions. In S. 198's originally proposed form, no such exemption was allowed. Passage would have precluded circulation both out of the library as well as in-house, unless individual contracts were negotiated with software publishers. Libraries have neither the time nor funds to do this. Software collections would have been limited to titles whose publishers chose to negotiate. This might have made collection balance difficult.

Since the beginning of 1989, we have been working closely with representatives of the American Library Association and the Software Publisher's Association to make sure that both Library, and copyright owners', needs are met. During the 4/19/89 hearing before the Copyright, Trademarks, and Patents Subcommittee, an amendment to S. 198 will be proposed. It will contain an exemption for non-profit libraries. It is gratifying to see that the software industry was willing to address our concerns with the bill. And that libraries have agreed to provide additional copyright information labels on the software materials they collect and circulate. We welcome this mood of cooperation and hope that we may continue this relationship.

Prior to this meeting of the minds, software publishers had urged us to believe that software is a special case for copyright law. However, we suggested that the cost, and ease of copying factors, are not pertinent. Many library materials are expensive and may be easily duplicated. The issue was that this bill, as proposed, would have infringed on the library's right to collect and make available whatever it sees fit, which will provide services to its patrons. Libraries have the right to collect and circulate whatever their patrons need to further their personal advancement.

This bill may still affect school district labs and academic labs. The bill's language, as now proposed, has no specific educational exemption. Only the phrase "non-profit libraries" is used in regard to exemptions.

We urge legislators to protect the rights of library patrons, non-profit institutions, and educational institutions when they consider the language of this bill.